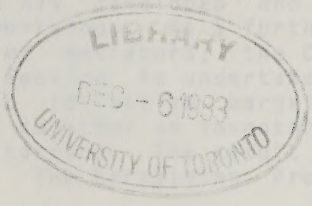

THE BARGAINING PROCESS AND MEDIATION

Education Relations Commission
111 Avenue Road, Suite 400
Toronto, Ontario M5R 3J8

PREFACE

The Education Relations Commission has a responsibility under Section 60 (1) (e) of **The School Boards and Teachers Collective Negotiations Act** to select and train persons to act as mediators. In its efforts to meet this statutory obligation, the Commission has instituted careful selection procedures, and has developed and conducted several intensive training workshops. As a further effort at improving the expertise of mediators, the Commission asked its Research Services Section to undertake a review of the various approaches to collective bargaining and labour mediation, and to put together an inventory of commonly used strategies and tactics. The result of this undertaking was the document, **The Bargaining Process and Mediation.**

The reader will find condensed in this report a wide range of ideas on bargaining and mediation: from the traditional, adversarial style of bargaining to the more recent problem solving and other collaborative methods; from tips on how mediators conduct meetings, to strategies and tactics they use to apply pressure on the parties to avoid or end a strike/lock-out.

The comments and opinions expressed in this document are intended to increase awareness and to promote discussion of the bargaining and mediation processes, they are not meant to be taken as a reflection of the official policy or views of the Education Relations Commission.

SUMMARY OF CONTENTS

INTRODUCTION

The Great Man Theory and Trial by Combat

For many years it has been an accepted truth among labour relations experts and practitioners that mediation is more of an art than a science. According to conventional wisdom, one must be born with the instincts necessary for the job; it cannot be taught. A second, and closely related belief is that no two mediation cases are ever the same. The personalities involved in each dispute differ, the issues vary, and the political and economic forces in each situation are rarely the same. A third important belief is that every mediator has his or her own style of mediating, with no particular style being more successful than others. Following one's own style is thought to be important for success. As a consequence of these beliefs it is difficult, if not impossible, to make general statements about the mediation process. There are no general laws; what a mediator does depends on the specifics of a given situation, and even then, no two mediators will react to the same situation in precisely the same way.

For those who embrace these beliefs, the selection and training of mediators is straight forward - select only "great men" and expose them to "trial by combat". Let them sharpen the tools of their craft through experience. After a reasonable apprenticeship period with a seasoned mediator, and a subsequent term of direct "hands on experience", a labour relations agency simply retains those who survive and replaces those who did not, with survival depending, in large part, on maintaining acceptability with labour and management, and establishing a reputation for getting settlements short of strike or lock-out action.

Some of the characteristics of the ideal mediator, or the "great man", have been summarized by Julius Manson, former Executive Director of the New York State Board of

Mediation, after surveying the selection criteria of various state and federal mediation agencies in the United States. Those qualities, which are set out below in Figure 1, are as important today as they were in 1958, when Manson conducted his survey.

Figure 1

Desirable Qualities in a Mediator

Character	Emotional
Integrity	Patience
Impartiality	Perseverence
Fairness	Empathy
Courage	Stability
Intellectual	**Social**
Imagination	Tact
Ingenuity	Diplomacy
Quickness	Consideration
Logic	Putting people at ease
	Sense of humour
Technical	Art of listening
	Art of speaking
Controlling a meeting	Act unobtrusively
Knowledge of labour relations and associated fields	Power to persuade
Ability to write	
Ability to summarize	

Source: Labour Law Journal 1958, 9, p.761.

Toward a Greater Emphasis on "Professionalism" and Structured Training

Traditional attitudes and beliefs are changing. There is now a growing emphasis on professionalizing the mediation role; on systematizing some of the basic underlying principles of mediation and compiling an inventory of logically derived strategies and tactics which go toward making up the stock in trade of the mediator. This new

concept of the role of the mediator and the mediation process implies that mediators are not just born, but can also be taught; that even naturally gifted mediators can profit from the accumulated wisdom of other mediators; and that formalized training programmes can be developed and profitably used by labour relations agencies.

Why the change in thinking? There appear to be a number of factors involved. First of all, labour relations agencies have discovered that finding "great men" is, at the best of times, a difficult job, particularly when one is limited to offering prospective mediators current government salaries and per diem rates. Furthermore, once mediators develop a successful reputation, they are often lured away from government service by more lucrative offers of employment. These two practical considerations, i.e., of finding ideal candidates and replacing the turnover of experienced mediators, has caused many in the field of dispute resolution to reconsider the nature of mediation and the merits of training programmes. A number of related developments have added further momentum to this trend: (1) The academic community has recently come up with several landmark studies of the collective bargaining and mediation processes. Thus, a greater theoretical and empirical understanding of these processes is now available and can be used as a basis for future training. (2) There has been a marked increase in the level of education among mediators. This has brought with it an increased awareness and acceptance of "theory" as a basis for professionalizing the mediation role. (3) Prestigious mediators and various heads of government and quasi-government agencies have actively campaigned to have the role of mediator recognized by other professionals as a profession in its own right and as having a body of accumulated knowledge that could be usefully applied to diverse areas of conflict, including marriage, race, ethic, and international relations, to name only a few potential areas of application. The Society of Professionals in Dispute Resolution (SPIDR) and the Public Employment Relations Service (PERS) have been particularly active in trying to professionalize the role of mediator and legitimize its

status in the eyes of other professions. And, (4) the rapid growth of bargaining in the public sector has created pressures to develop a larger pool of mediators.

Training Needs of the ERC

The need for mediation training is perhaps more acute for the Education Relations Commission (ERC) than for many other labour relations agencies. Since the mediation requirements of the ERC are largely seasonal, the Commission does not employ a permanent complement of mediators. Instead, it relies on the use of ad hoc mediators during demand times. The practice of using ad hoc mediators, most of whom do not work on more than two or three cases per year, means that acquiring knowledge about the collective bargaining and mediation processes through the accumulation of practical field experience is a slow and inadequate method of training. The experiential learning process must be supplemented by more formal, and intensive pre-service and in-service training programmes.

The gradual increase in the bargaining sophistication of teacher and trustee negotiators also places greater demands on the ERC to provide more skillful mediators. The provincial teacher and trustee organizations, especially, are much more knowledgeable now. They have improved their communication systems and research departments, and developed their own training programmes for negotiators. The customs and bargaining procedures at the local level are becoming institutionalized. Thus, the parties are now in a much better position to judge the competency of a mediator. They are becoming more discriminating, more demanding.

The use of ad hoc mediators, however, places constraints on the scope of training the ERC can offer its new mediators. For example, the United States Federal Mediation and Conciliation Service (FMCS), which employs hundreds of full-time mediators throughout the United States, sponsors a six-week inservice training programme in Washington. This type of intensive programme is not cost efficient for

training ad hoc mediators who will receive a very limited case load. Yet the need for some form of improved training exists.

The Objectives of the Training Manual

This manual is designed to assist the prospective mediator in building a conceptual understanding of both the collective bargaining and mediation processes. As Edward Peters, a well-known and widely respected mediator once remarked: "The conciliation [mediation] process is part of the collective bargaining process and can have no existence apart from it. Hence, a grasp of [the] fundamentals of collective bargaining is a necessary prerequisite for an understanding of the conciliator's function." We believe that an understanding of the basic dynamics of the collective bargaining process is a natural starting point for anyone interested in becoming a labour mediator. As Clark Kerr has noted: "One of the greatest contributions [mediators make] in most disputes is to supply the parties with negotiating skills which they lack - to allow them to find areas of settlement that exist but which their own negotiating awkwardness prevents them from seeing or realizing."

One of the objectives of this document will be to acquaint the reader with the various stages or phases of the collective bargaining process. Most observers of the bargaining process are in agreement that there are three general stages. A thorough understanding of these stages can be indispensable as a diagnostic tool. It can assist a mediator in identifying some of the major stumbling blocks to reaching an agreement; it can be useful in selecting an appropriate strategy or tactic; and it can give the mediator a general feel for when he or she should time their moves.

In addition to analyzing the general flow of the bargaining process, it can often be useful to break down the process into four different sub-processes. These sub-processes have been called distributive (or power) bargaining,

intra-organizational (or internal) bargaining, attitudinal structuring, and integrative (or problem-solving) bargaining. **Distributive bargaining** is a process for resolving conflicts of interest between management and unions. It determines the allocation of scarce resources and produces "winners" and "losers". Distributive bargaining is probably the most central activity. It is certainly the most familiar sub-process, and what most people think constitutes "bargaining" in the usual sense of the word. **Intra-organizational** bargaining refers to the negotiations or concensus building that goes on within management and unions. Typically, each side experiences a certain amount of internal disagreement over the setting of bargaining objectives, the establishment of priorities, and the allocation of resources. These disagreements may involve conflicts among various factions within the larger constituency, splits among members on the bargaining team, or differences between constituent aspirations and what the chief negotiator and his team think they can reasonably expect to produce at the bargaining table. Because school boards and teacher affiliates are political organizations, internal political dynamics become very important factors in the negotiations process. **Attitudinal structuring** refers to the furthering of harmonious relations. It involves the building of trust, respect, friendship, and cooperation. Whereas distributive bargaining tends to strain good relationships, the process of attitudinal structuring attempts to repair and improve them. Finally, integrative or **problem-solving** bargaining refers to the attainment of objectives for which there are no fundamental conflicts of interest between the parties. It involves the resolution of problems that are of common concern to the parties, and usually results in some form of benefit accruing to both sides. A second objective of this manual, then, is to explicate the general logic and functions behind these sub-processes and to introduce the reader to some of the types of strategies and tactics the parties use in carrying out these areas of bargaining. Some advance knowledge of the strategical and tactical elements of bargaining will assist one in interpreting the negotiations process and lending appropriate mediator assistance.

A third objective will be to give the reader some feel for the dynamics of the mediation process. The mediation process involves three general stages. The first stage is usually given over to developing "acceptability" with the parties and diagnosing the situation. The second stage involves more active efforts at assisting the parties and the third stage involves the application of pressures for settlement.

Finally, the fourth objective is to discuss the specific strategies and tactics mediators use in trying to effect a settlement. This discussion will provide the reader with a variety of practical mediation skills.

Obviously, anyone who faithfully reads and studies this document will not automatically know how to mediate. Practical experience will always be necessary to internalize the various mediator skills. What this manual should do, though, is accelerate the learning process and hopefully eliminate some of the costly and probably unnecessary mistakes that accompany a training process which relies, in the final analysis, on trial and error learning out in the field.

THE STAGES OF BARGAINING[1]

As discussed previously, the collective bargaining process passes through three general stages or phases: (1) establishing the initial bargaining positions, (2) narrowing the range, and (3) the "crisis" preceding the decision to settle or invoke sanctions.[2] These three stages of bargaining are an abstraction. The boundaries between the various stages are not clearly defined, nor is movement through the stages always straightforward or simple, for there are frequently obstacles to orderly progression, and retrogressions are not uncommon. In some negotiations these phases may be repeated during each bargaining session, or with respect to each issue.

Although the notion of bargaining stages is an abstraction, it can nevertheless be helpful to negotiators and mediators in getting their "bearings", much the same way as a road map (another form of abstraction) can be useful to a traveller in pointing himself in the proper direction.

What we propose to do in this section is to sketch out, using a broad brush approach, the basic outlines of these three stages. We will highlight one or two of the key features in each stage and describe some of the logic behind them.

---

1 Much of this discussion is taken from Ann Douglas, Industrial Peacemaking (New York: Columbia University Press, 1962) pp.13-99.

2 We have restricted our focus in this discussion to only three stages. There is also a pre-negotiations stage involving preparation for bargaining and a ratification stage which follows agreement at the table. Some would also argue that the bargaining process extends into contract administration, the handling of grievances, and arbitration (both interest and rights).

Stage I: Establishing the Negotiating Range

In the first phase of negotiations, the parties try to set out their initial bargaining positions. The union will usually present a long list of proposals that cover its entire range of interests and concerns. Some of these proposals will become critically important to resolving the negotiations. Others may be important but still be open to trade-off toward the end of negotiations. Some proposals, although important, may be included only to introduce the other party to an issue that will become the focus of negotiations in a future round of bargaining. The remaining issues will generally be of lower priority and will usually be withdrawn from the table as the negotiations progress. This long list of proposals serves several functions. First, it allows the union an opportunity to demonstrate to all its constituents its willingness to voice their concerns at the table. Second, by presenting all of the membership's demands, the union avoids creating sensitive internal political problems that would arise if the leadership tried to delete certain items from the agenda. It is much easier for a union to include all proposals, no matter how unrealistic or unwarranted they may be, and let management assume the responsibility for rejecting these demands. Third, a union's real priorities can be more easily camouflaged if it enters negotiations with a long list of proposals and inflated bargaining positions on some, if not all, of the issues.

The employer's bargaining behaviour during this initial phase is variable. Some boards will present their own set of proposals to counterbalance the union's demands. Others will wait to see the union's package of demands before responding. The employer will also try to camouflage its position.

During the first bargaining phase, the parties' positions are typically far apart and the differences often appear deep and irreconcilable. Both sides usually take delight in giving lengthy speeches about the firmness of their positions. These talks take on the quality of public

oratory, and seem to be well planned and rehearsed. Each side relishes exposing and discrediting the other side. The attacks can be vigorous and spirited; sometimes derisive and venomous.

Those unfamiliar with the negotiations process are sometimes misled by these exchanges. To the uninitiated, the negotiators appear as anxious, aggressive and hostile personalities, and their rigid, intractible bargaining positions are considered signs of mental inflexibility or dogmatism. In some instances, these impressions can be off base. It is important to recognize that each negotiator is a representative or "committed delegate" acting on behalf of a constituent group. Therefore much of what takes place in the early stages of bargaining involve exchanges at the inter-party level. While the chief negotiators may be expressing the frustrations and hostile feelings of their respective constituencies, there may still be (and often is in the case of mature, professional negotiators) personal goodwill and respect at the interpersonal level. Thus, a good deal of bargaining in the early stages involves a certain amount of "grandstanding".

The extreme positions and strong and often emotionally charged arguments and counter-arguments serve useful purposes in the bargaining process. First of all, the parties' initial bargaining positions block out the territory within which the parties will eventually have to settle; i.e., they set up a bargaining range. Second, the quick freezing of positions and the emphasis on disagreement conveys to the other party the degree of commitment each has to its own position and this in turn influences the perceptions and expectations of the other party as to where in the range a compromise can be struck. And third, although it may appear ironic, the conflict between positions can facilitate future settlement. As Ann Douglas has pointed out, the emphasis on disagreement during phase one draws "the attention of each party to the fact that the opposite is equally prepared to resist attack, [and] insures that the expectations and predictions on each side are significantly en-

larged beyond anything with which either could possibly be equipped on first approaching the table. It cannot be emphasized too strongly how effective this contribution can be in softening up at the heart of the range a wider stretch of possible settlement points which, if they are not all equally desirable, still may emerge at the end as acceptable." It is necessary, of course, for both parties to participate fully in hammering out the bargaining range before this latter function can be fulfilled. (More will be said later about the problems that arise when one party either fails to present a firm initial bargaining position or moves from its initial position prematurely.)

Experienced "professional" negotiators* strive continually to prevent conflict from spilling over from the inter-party level to the interpersonal level. Personal attacks are avoided. Rudeness, irritation, and habits of not listening are limited, to the extent that this is possible in collective bargaining. Unfortunately, inter-party conflict often creates levels of tension sufficiently high as to deterioriate interpersonal relationships. The risks of interpersonal conflict developing are greater when negotiators are new to collective bargaining or to one another, when they have a poor tolerance for frustration, ambiguity and anxiety, or when a negotiator adopts purposely an abrasive behaviour in the mistaken belief that this is an acceptable and effective negotiating style.

b) Stage II: Narrowing the Range

Whereas phase one is characterized by "demands" and extended speech making, phase two is characterized by "proposals", more rapid interchanges between the negotiators, tactical manoeuvring, and probing of positions. Phase two, if properly managed, involves some of the most brilliant displays of negotiating skills.

*"Professional" negotiators are not necessarily the same as "hired guns".

To reach agreement the parties must retreat from their original firm positions that were set out during the first phase. Yet to retreat from an original position is frought with difficulties. A particularly vexing problem involves the timing of concession-making. In the words of Ann Douglas "concessions ahead of schedule benefit no one, not even the receiving party. Not only does a party tantalize and mislead the opponent if it relaxes its firmness too quickly, but the parties also need the opportunity to experience exhaustion of their demands before they can be satisfied that they have drained what was there to be had. Premature movement robs them of this experience." A negotiator, in Douglas' view, becomes aware that he has obtained the "best" offer from his opponent, not because his opponent has told him so "but because he has personally experienced the futility of seeking more."

This basic dilemma helps to explain some of the contradictory behaviours one observes during phase two. To quote Douglas: "To the lay mind, some of the disconcerting aspects of this period are the nonchalance with which negotiators make assertions of fact, then subsequently deny them; with which they make critical issues out of special demands, then barter them away in toto - the famous quid pro quo - for something entirely different; with which they enter into agreements on specific items while reserving the right to abrogate the agreements later on; with which they examine numerous minor points exhaustively, then cavalierly dismiss them with an announcement that their fate hinges on a still undefined 'package deal' to be worked out later."

Negotiations during this phase are not carried out in the typical business fashion that rewards parsimony, logic and efficiency. As Douglas points out in her study of the bargaining process, "indirection is wilfully incorporated into the verbal system". Although this form of communication "prolongs uncertainities and delays development of conclusions which must come before decisive action can be taken [it] is not regarded in negotiating circles as a cost of

doing business. The communicant at the conference table knows better than to scorn **non sequiturs** - gaps can be made more telling than words - or to grow impatient with longwinded sentences - some messages cannot cross the airways unless shielded between spoken lines."

The seemingly endless debating that goes on during most negotiations often looks to the uninitiated as a form of senseless filibuster that only signifies the parties' reluctance to get down to settling the issues. On the contrary, it is not until discussion of the issues has been thoroughly exhausted that movement becomes timely.

Stage III: The "Crisis" Preceding the Decision to Settle or Invoke Sanctions

In the final stage of bargaining there is a noticeable increase in tension as the parties head toward "the moment of truth" where the hard decision to either settle or strike must be made. Even the mediator, if present, becomes caught up in the tension and the ambiguity surrounding the nature of the final decision.

This "photo finish", or "crisis" as Douglas describes it, is "often long and sometimes laboured, [and] is reacted to in the conference [bargaining] room as almost pleasurable. Not only is it useless to think of eliminating this fateful juncture, but the sequel of crisis - into - settlement fulfills a natural if obscure, requirement of the negotiating process. The rise in tension level should be considered as confirmation of progress."

A mediator will often try to facilitate the tension - building process, for example, by keeping the parties separated and controlling the communication flow. In his reports to each side, he screens the information in a manner that steps up the sense of adamancy and pressure which frequently causes each side to over-estimate the status of the conflict. During the final moments of a dispute that seems eventually headed toward a strike or lock-out he may even

indict (although this may be a dangerous practice) both parties for the unresolved state of affairs - an action that contrasts to his usually friendly, even collaborative orientation toward them during the earlier phases.

THE PROCESSES OF BARGAINING

The bargaining process is often discussed as though it was a single process. On closer inspection, there seems to be at least four systems of activity.

Following the lead of Walton and McKersie[3], we call these subprocesses: distributive bargaining, intra-organizational (or internal) bargaining, attitudinal structuring (or maintaining and promoting harmonious relations), and integrative (or problem-solving) bargaining. Each of these subprocesses is discussed in detail below.

A. DISTRIBUTIVE BARGAINING

As pointed out in the last chapter, each party presents its initial offer or demand during the first stage of bargaining. These initial offers and demands are simply bargaining positions from which the parties will eventually retreat over the course of negotiations. If the parties are experienced, they go into the negotiations process with some idea of what their "fallback" positions will be. Beyond these fallback positions is a party's "bottom line" or "resistance point", which is a position below (or above) which a party is unwilling to move.

To illustrate: A teachers' negotiating team initially requests a 20% increase in salary. In response, the board counters with an opening position of 2%. The teachers, in turn, drop to a fallback position of 16% while the board improves its offer to 6%. The parties continue to narrow the range in this fashion until they approach their bottom line.

---

3 A Behavioral Theory of Labor Negotiations (New York: McGraw Hill) 1965 .

In some cases the parties' resistance points overlap, resulting in a "positive settlement range". For example, the teachers' bottom line could be 10% while the board's might be 12%. In this situation the overlap will usually result in an agreement. In other cases, the resistance points will not overlap, leaving a "negative settlement range". The teachers, for example, may be stuck at 12% while the board holds adamantly to 10%. In this situation there is a 2% gap in their positions. The parties will remain at impasse until one or both sides alters their bottom line.

Throughout the negotiations process neither side knows, with any certainty, the true bottom line of its opponent. Much of what takes place in distributive bargaining involves the collection, exchange, and manipulation of information that can be used to identify and alter an opponent's point of resistance. In general terms, a negotiator wants to to know the importance its opponent attaches to a range of settlement outcomes. What benefits does it obtain from these outcomes? Secondly, how committed is the other side to maintaining its bargaining position? and thirdly, what costs of disagreement is the opponent willing to accept in order to hold its bottom line?

The overall objective in distributive bargaining is, of course, for each party to "cut" the best deal it can for itself. To accomplish this, each party tries to obtain a settlement as close to its opponent's true bottom line as possible. There are five basic strategies a party can follow to reach this goal. (1) As a preliminary strategy, discovering the opponent's bottom line. (2) Disguising one's own bottom line. (3) Using persuasion and pressure tactics to encourage an opponent to move to its true bottom line. (4) Committing oneself to a particular bargaining position in order to force the other side into revising its position or face the prospect of a strike, lock-out, or other sanction. And (5) blocking an opponent from making similar commitments.

In the remainder of this section we provide a few brief examples of the kinds of tactics that fit into each of these negotiating strategies. To round out the section, we also discuss a further set of tactics and tactical aids that are commonly used by the parties to make graceful retreats from committed positions.

i) Finding the Opposition's Bottom Line

- it is a common practice among experienced negotiators to assign each member of their bargaining team the responsibility of observing and recording the non-verbal behaviour of a member on the other team to obtain clues about their priorities and bargaining strength.

- the inexperienced members of the opposition team are sometimes probed for their reactions to proposals because they are more likely to let clues slip out inadvertently in such discussions.

- the meaning and rationale for an opponent's position are explored. Fringe issues will often turn out to be issues for which the opposition is not well prepared .

- a well-disciplined negotiating team tries to minimize their own rate of discussion, and maximize that of their opponent. The more an opponent talks, the more information it is likely to give away that is strategically important. Experienced negotiators like to use open-ended (as opposed to close-ended) questions to keep the other side talking.

- the application of pressure on the other team, e.g., through the expression of exaggerated impatience, threats to walk out of the negotiations meeting, or threats to conduct last offer and strike votes, is sometimes used to elicit clues.

ii) Disguising One's Bottom Line

- in order to prevent the untimely release of information that might disclose a party's bottom line, it is customary for bargaining teams to use a single spokesman or chairman who is given the responsibility of conducting the negotiations with the other side. The chairman, who is usually the most skilled member on the team, also has the responsibility for controlling the participation of other team members. He will usually restrict their involvement to situations where they can contribute specialized knowledge. A "numbers

man", for instance, will usually restrict his discussion to technical matters like projected costs, otherwise he is expected to remain silent. Should a member feel compelled to enter the discussion, he normally requests permission from the chairman or requests a caucus in order to advise the chairman and other team members of his thoughts. The convention of using a single spokesman also prevents the opposition from using divide and conquer strategies.

- submitting a large number of proposals for changes to the collective agreement disguises one's priorities.

- experienced negotiators are tight-lipped about negotiating strategy. To prevent leaks, they only discuss strategy with team members (and then, sometimes with only key members) or important constituent decision makers.

- notes and other preparatory material are carefully guarded when meeting in joint caucus and never left behind when leaving the conference room to hold a private caucus, no matter how brief it may be.

iii) Persuasion and Pressure Tactics

Another group of tactics are designed to persuade and pressure an opponent into altering his position by having him modify the importance of obtaining a given bargaining objective. For example:

- school boards usually try to impress upon teachers the cost implications of their proposals, and their inability to meet these higher costs without having to reduce staff. The teachers, on the other hand, argue their proposals will improve the quality of education.

- sometimes a party will try to communicate directly with its opponent's principals in order to lower constituent solidarity and thereby weaken the bargaining team's resolve to hold out for a better settlement. This may range from informal, behind-the-scences discussions, for example, with other "moderate" leaders who are not present at the bargaining table and who may be in a position to exert some influence if they "only knew the actual state of affairs", to paid public advertisements critical of the other side's bargaining position.

- common teacher pressure tactics include:

- charging the other side with bargaining in bad faith;

- threatening to conduct last offer and strike votes;

- emphasizing, and if necessary encouraging, the spread of militancy among the constituents;

- physically and emotionally exhausting the opposition by dragging out the negotiations process by increasing the length of the process, increasing the number of negotiating sessions required to reach agreement, or enengaging the other side in "marathon" bargaining sessions;

- picketing in front of the homes of board administrators and prominent trustees;

- demonstrating at board meetings;

- developing, and making public knowledge of, strike funds and mutual assistance pacts with teachers in other boards,

- campaigning actively in the schools to increase membership solidarity.

- common trustee pressure tactics include:

  - introducing new issues in dispute;

  - establishing preconditions for continued negotiations, e.g., demanding that economic matters be settled first before discussing working conditions;

  - refusing to follow established conventions, e.g., to no longer reciprocate an opponent's concessions;

  - employing delay tactics, like adjourning a meeting until the teachers are willing to make a concession;

  - threatening to alter unilaterally the terms and conditions of employment once 60 days has elapsed from the date of the publication of the fact finder's report;

  - threatening to "contract strip" in the current or subsequent negotiations;

  - walking out of the negotiations meeting;

  - refusing to grant salary increases retroactive to the termination date of the previous agreement.

iv) Commitment Tactics

Commitment tactics are also commonly used in collective bargaining. According to conventional bargaining theory, the more a party appears to be committed to a particular objective, to be willing to go all the way - even to the point of invoking a strike or lock-out - the more likely will the other side be willing to concede, if it wants to avoid an all out power struggle. Some of the tactics used by negotiators to make their commitments seem credible, include the following:

- underscoring one's position through endless repetition of demands;
- linking specific demands to abstract principles, policies, or elements of personal integrity. To abandon one's bargaining position would therefore discredit one's principles, personal integrity, etc.;
- pledging the prestige and bargaining reputation of a higher official or party organization to obtaining the demand. Bringing in a member of a provincial organization for consultation, or to assume the responsibilities of bargaining would be an example of this type of tactic;
- a chief negotiator may commit himself or his team to a bargaining position. This strategy frequently involves elements of bluff and creates a situation where the bargaining team cannot back down without losing face or destroying the credibility of any further bargaining commitment strategies;
- a negotiating team will sometimes intentionally raise the expectations of its membership to the point where the hands of the bargaining team become tied by the militancy of the constituent group. A bargaining team then becomes irrevocably committed to a particular position and only a concession by the other side will avoid a strike or lock-out.

v) Blocking an Opponent's Commitment Tactics

A negotiating team may also have an interest in preserving flexible negotiations and therefore wish to prevent its opponent from making irrevocable commitments. For example:

- experienced negotiators generally set out in their ground rules prohibitions against the use of transcripts, bargaining through the media, and "goldfish bowl" negotiations (i.e., situations where any one is entitled to attend the negotiations sessions). This helps to prevent the parties from becoming publicly committed to a position;

- the agenda can be structured, or the meeting can be chaired in such a fashion, that the time available for discussion minimizes the opportunity for the repetition of bargaining positions;

- some negotiators try to delay responding to an opponent's original proposals as a way of preventing it from digging in on a sensitive issue;

- sending an issue to sub-committee or removing it from the table by setting up a joint fact finding committee to study the matter further can also prevent a party from establishing a firm commitment;

- when a member of a negotiating team has made an irrecovable commitment, he can be replaced by a new member who is free to negotiate without the constraints of past commitments;

- if a party anticipates that its opponent is likely to commit itself to a position, it can request a change in agenda, move for the adjournment of the meeting, or avoid requesting or otherwise offering an opportunity to the other side to make its commitment public;

- a party can simply ignore commitments made by the other side or divert discussion from the tactical commitment by interjecting humour, or introducing casual conversation;

- it is also a cardinal rule in collective bargaining to allow an opponent opportunities to revise his commitments; to allow him to alter his bargaining position without losing-face, and with out jeopardizing his reputation as an effective negotiator. An experienced negotiator, for

example, never reminds his opponent that he retreated from his final or last offer.

vi) Making a Graceful Retreat from a Committed Position

There are a variety of tactics a party can use to retreat from a committed position with a minimal loss of face. Some of these tactics include:

- rationalizing the change in one's position by saying that it was done in response to some movement or change in the opponent's bargaining position;
- withdrawing or modifying a position out of concern for public welfare;
- relating the change in one's position to some change in the available facts, e.g., a recent rise in cost-of-living, new or emerging settlement trends, or a recent announcement of higher government grants, etc.;
- claiming to soften one's position in order to preserve the harmonious working relationships which both sides have been working for and value;
- portraying the concession as a favour to the other side. Insisting upon the quid pro quo, that is, expressing an expectation that one's opponent must return the favour by dropping an equally important demand;
- silently dropping an issue.
- announcing the settlement to the constituents in terms that obscure what concessions were made and by whom;

vii) Conventions Governing Tactical Retreats

Experienced negotiators have established conventions to facilitate tactical retreats. Some of these conventions include:

- the bargaining team that is furthest from its bottom line (also referred to by some as target point, or resistance point) is usually the first to move; since moves are generally made in an alternating fashion, it therefore becomes important to know who made the last move. For a move to be reciprocated by the other side, it is obviously important for one's own move to be

meaningful; it should match the spirit of the opponent's last concession. Particularly important is a move that brings one side into the so-called "range of reasonableness". Any move within this range is a significant move and should be met by an equally significant concession by the other side;

- concessions are not usually made until either the discussion of a topic has been exhausted, until the time available for negotiations is nearing an end, or until there is a sense of urgency to settle. These latter situations are often called "pressure points" and occur in teacher-board bargaining in June just prior to breaking-off for summer holidays, in late August and early September which is when collective agreements expire and compulsory fact finding begins, or prior to and immediately after last offer and strike votes;

- skilled negotiators usually try to ensure that their opponent will reciprocate in kind before making a concession. This often involves the use of "sign language" and "off-the record discussions" to co-ordinate their movement. These two topics are discussed below in detail.

viii) Tactical Aids to Graceful Retreat

a) Sign Language

Sign language refers to a form of tacit communication between negotiators whereby they express, often in a symbolic manner, their intention to reduce their bargaining position or concede on an issue provided, of course, that there is a corresponding intent by the opponent to reduce its own bargaining demands. The obliqueness of the communication prevents a party's actions from appearing to be a sign of weakness and, if its overtures for proceeding toward settlement are rebuffed by the other side, it allows the party the flexibility of moving back to a position of strength.

An appreciation for sign language can be gained by first looking at the structure of verbal commitment statements. A complete commitment statement is comprised of three elements: (a) the degree of finality in a party's position, (b) the degree of specificity of its demand, and (c) the con-

sequences that will befall the opponent if it does not concede to this demand. An example of a commitment statement that is firm on all three dimensions would be: "The elmentary teachers in this board must have a 10.5% increase on the grid plus the PTR provision proposed in the teachers' last brief or we are prepared to take a strike vote next week." A commitment statement that has less finality, less specificity, and more vague consequences for failing to grant the demand would be: "The elementary teachers in this board expect the trustees to agree to a fair and equitable settlement on both monetary and working conditions items so that the positive relationship between teachers and trustees can be maintained and strengthened."

Experienced negotiators are sensitive to the structure of these commitment statements. For example, a union negotiator who wants to convey flexibility but still give the impression of bargaining with strength and determinedness will make commitment statements that are firm about the finality of their position, take a tough stance on what consequences will be associated with the board's failure to agree to the teachers' demands, but be unspecific about what constitutes an "acceptable offer". A school board negotiator who does not want a strike or lock-out may be adamant that a specific offer is the board's last and final offer but say nothing about what the board will do if the offer is rejected.

Sign language functions in much the same way as varying the firmness and completeness of verbal commitment statements. It interacts with these statements to form another layer of complexity. Here are some typical examples of sign language:

- the conspicuous silence or non-response. A school board, for instance, may say "NO" each time a teacher negotiating team demands that a PTR provision be included in the collective agreement. Then, during a later phase in bargaining when the issue is brought up again, the board may say absolutely nothing. This may suggest a change in position or a willingness to concede on the issue,

provided that other issues are settled to the board's satisfaction. The non-response becomes a sign or signal only when it is interpreted against the larger backdrop of the negotiations process. Its meaning becomes clear only when it is placed in relation to the whole of the bargaining process.

- stepping out ahead of one's committee or constituents. A chief negotiator will sometimes say that he is willing to accept the other side's position, but he has not talked as yet with his committee about the issue. Personally he would be willing to sell it to the membership, if he is not overruled by the committee.

- pointing to a settlement elsewhere that would constitute an acceptable agreement. This is often done by treating the acceptable settlement as though it were a minimum demand. "You won't even offer us the UAW Cola!"

- skipping over an item as a way of indicating one's willingness to trade-off for something of greater importance. For example, a school board negotiator might say: "I don't think these fringe benefit issues will create any problems. Let's pass over these items for now and deal with the major issues of salary and class size." In effect, the board negotiator is saying: "I'm willing to concede on the fringe benefits provided the salary and class size issues are settled to my satisfaction."

- if a committee member passes a note to the chief negotiator or asks for a caucus during discussion of an important issue, it might indicate a change in position.

It is hard to over-emphasize the importance of sign language to the successful functioning of the collective bargaining process. It is absolutely vital for paving the way toward a graceful retreat from the fixed positions the parties carve out during the first phase of negotiations. It is a tool the parties often have to rely on as they grope their way toward a settlement.

Unfortunately, sign language can only be used successfully by experienced negotiators who have learned to develop a sensitivity to, and understanding of, this form of communication. A history of rapid turnover among teacher and school board negotiators in Ontario has probably limited the development of these sorts of skills.

The successful use of tacit communication also rests on the willingness of negotiators to be open and honest in their dealings, on their willingness to trust their opponent to reciprocate in a spirit of goodwill and fair play, and on their courage to take risks in the hope of finding a settlement acceptable to both sides. Again, it is unfortunate that these conditions do not exist in some teacher school-board negotiating relationships. The win-lose bargaining attitudes adopted by some negotiators, the attendant high levels of mistrust, suspicion, and generally distorted perceptions of one another preclude the use of sign language. Their suspicions and fears of being double-crossed close off opportunities to engage in tacit communication. They deny themselves the use of a communication mode that is vital to reaching a settlement. In the end, they are forced to rely upon the services of a third party, usually a mediator.

b) Off-the-record Discussions

Off-the-record discussions between the two chief negotiators is another form of communication that is commonly used for orchestrating a graceful retreat from an earlier bargaining position. It is used when normal lines of communication have broken down, or are unable to convey information of an important, complex or confidential nature necessary for reaching an agreement.

These confidential, private meetings allow the two spokesmen to talk to one another in a "man to man" fashion, without having to experience constraints upon their behaviour by other members of the bargaining committees. They can freely exchange confidences because no one is present to bear witness against them. If one negotiator violates a confidence, the other can easily deny the statement that has been attributed to him. The off-the-record discussion therefore allows representatives from the two sides the opportunity to explore various alternative solutions to the deadlock without having to worry about undermining their own bargaining position. It serves the same

tactical function as sign language, but it is a much more direct method.

B. INTRAORGANIZATIONAL BARGAINING

Union and management organizations often lack internal consensus on the means and goals of negotiations. These internal differences are usually worked out during the negotiations process. But unfortunately, as will become apparent in later discussions, the strategies and tactics which are used by negotiators to bring about internal consensus often conflict with the requirements of other bargaining processes.

i) Types of Internal Conflict

There are two main forms of internal conflict - role conflict and factional conflict.

a) Role Conflict

A chief negotiator typically faces two sets of conflicting role expectations. His principals expect him to achieve certain bargaining objectives and to fight vigorously to obtain them. His opponent, meanwhile, expects him to be sensible in his demands and to conduct himself in a manner that does not jeopardize their relationship. If the chief negotiator fails to satisfy his constituent expectations he will likely be criticized, ridiculed, or even replaced as chief negotiator. Yet if he violates his opponent's expectations his opponent will probably retaliate, perhaps by invoking sanctions (walking out of the negotiations, striking or locking out), becoming less cooperative during the administration of the agreement, or undermining the chief negotiator's position and strength within his own organization. The chief negotiator, therefore, is someone caught in the middle.

b) **Factional Conflict**

Factional conflict arises when different groups within an organization or bargaining team have incompatible demands. Various factions - for example, along the lines of gender (male, female), residence (rural, urban) seniority or level of responsibility (teacher, principal, etc.) - typically have differing needs. This leads to disagreement over bargaining objectives, how objectives should be prioritized, what should be minimally acceptable to ratify the agreement, what strategies and tactics should be followed, and what type of relationship should be developed with the other party. As the focal point in the bargaining process and as one who is often required to make the hard decisions, the chief negotiator cannot avoid becoming involved in resolving factional conflict.

ii) Options Open to a Chief Negotiator

What can a chief negotiator do to resolve internal conflict? There are three basic options: (1) He can take a very active role, particularly early on in the pre-negotiations stage, and try to bring his constituents' aspirations into line with what he thinks will be his opponent's. He can do this by trying to avoid incompatible constituent expectations from arising or, if they have already emerged, try to revise them through rational arguments or the exercise of power. (2) He can take a less active approach in revising his constituents' expectations by structuring the situation so that the pressures of the bargaining process induce change in aspirations. While the chief negotiator privately and indirectly tries to reduce his constituents' expectations, he gives the public appearance of trying to do everything he can to obtain their objectives. This option occurs during the actual negotiations. (3) Lastly, the chief negotiator can adopt a passive role by ignoring incompatible expectations and effecting an agreement to the satisfaction of the opposing side. The objective here is to get an agreement and then try to "sell" it to the membership by either rationalizing the fact that expectations were not achieved, or obscuring and misrepresenting the actual level of settlement. This option, then, is used at the conclusion of negotiations. Each option is independent of the others, although all three can be, and often are, used in the bargaining process. In the following pages we shall discuss in more detail the strategies and tactics negotiators use to resolve internal conflict.

a) Avoiding Incompatible Expectations at the Prenegotiations Stage

Most experienced negotiators try to prevent their membership from developing unrealistic bargaining aspirations; from setting bargaining objectives which the negotiating team thinks it can not "deliver". The following

tactics are used by negotiators to provide themselves maximum flexibility during the bargaining process:

- persuading the membership they should approach the current bargaining round in an open, exploratory fashion. Rather than put forth specific demands, they should identify problem areas and keep their expectations vague and conservative until they can feel out the other side's approach to negotiations. The bargaining team may advise the constituents against going to the table with a long list of specific demands in case the opponent decides to retaliate with an equally long list of its own.

- since an experienced negotiating team has a great deal more bargaining expertise than the membership, it can advise them about the feasibility of attaining certain objectives. Attention can be focused on items of value to the organization but have little cost (economic or political) to the other side.

- limiting the participation of enthusiastic but naive and unrealistic members in setting the bargaining agenda.

b) Revising Expectations

As the negotiations unfold, experienced negotiators will often try to bring unrealistic constituent expectations into line with what is possible by relaying to them the opponent's counter-arguments to their demands. For example, this might mean going over the settlement trends in nearby boards, explaining government controls on spending, etc. The negotiator wants the membership to experience the pressure that the other side brings to the bargaining table.

At times, a union leader will use his personal power and prestige to bring recalcitrant members into line. He might offer rewards or withhold favours to induce compliance. Management will sometimes assist a union leader in these efforts by giving him political support. For example, management has been known to concede various grievances in order to support a union leader in controlling his membership.

There are times when a chief negotiator cannot directly confront his constituents, particularly those who hold extreme views. He must structure the situation so that they can learn on their own the need to revise expectations. This can be accomplished, for instance, by bringing militant members onto the bargaining committee and letting them experience first hand the opposition's resistance to their demands. It is one thing to throw out demands at a membership or board meeting, and quite another to be up there on the firing line trying to obtain them.

Another tactic is for the chief negotiator to bring the constituents face to face with a strike vote, with the hope that the continued costs of disagreement will become more apparent, and pressures will be generated to lower expectations.

c) **Rationalizing Failure**

Negotiators often "put on a show" or "go through the motions" as a method of getting themselves off the hook for not achieiving expectations. They try to demonstrate to their constituents that they at least fought hard and did everything possible to obtain their objectives. This may involve:

- keeping large numbers of issues, even minor ones, on the bargaining agenda long past the point when they should have been cleared away;
- wearing down the opposition physically and emotionally by protracting the negotiations, e.g., by endlessly repeating demands, scheduling scores of negotiating meetings, engaging in marathon bargaining sessions;
- using every leverage possible to squeeze more out of the opponent, e.g., by requesting the complete range of third party procedures; taking the negotiations right down to the wire, including going out on strike or taking a strike, if necessary;
- insulting or abusing members of the opposition to provide the constituency with vicarious thrills that might substitute for unmet objectives;

- using a scapegoat to diffuse the responsibility for settlement. The Anti-Inflation Board, fact finders, mediators, and even the ERC have been used as convenient scapegoats in the past.

d) Obscuring and Misrepresenting the Settlement

Negotiators have also been known to exaggerate or disguise the level and process of settlement in order to ensure their political survival. This often requires that decision-making be limited to a few individuals as negotiations go down to the wire. Anyone on the bargaining team who is under direct membership control, or who otherwise cannot be trusted to support the emerging settlement is often excluded from decision-making. One technique is to appoint them to a subcommittee to study a relatively minor item while the major issues are being settled by the leaders of the two sides. Sometimes the teams will adjourn a meeting and later reconvene when a recalcitrant member is indisposed.

There is a natural tendency for the two negotiating committees to insulate themselves from constituent pressures during the final throes of bargaining. By shrouding the final decision-making process in mystery, they give themselves the flexibility necessary to obscure and misrepresent the actual settlement. Each side can reconstruct events to cast itself in a good light.

Other tactics the parties use to give themselves the flexibility they need to claim success before their membership include:

- making the issues appear so complex that few in the membership have the expertise to challenge the negotiating team;

- emphasizing the importance of the gains by manipulating the subjective value of a benefit. A teachers' group, for example, may proudly announce to its membership that they are the first in their area to include a board policy on PTR in the collective agreement, yet say nothing about the fact that their PTR is one of the highest in the province and they were completely unsuccessful in

their attempts to have it lowered. Cola clauses with "triggers" so high the clause has little likelihood of kicking-in is another example of a subjective "win".

C. ATTITUDINAL STRUCTURING (OR MAINTAINING AND PROMOTING HARMONIOUS RELATIONS)

Negotiators often become so embroiled in the distributive and internal political aspects of the collective bargaining process that they lose sight of the need to maintain and promote harmonious interpersonal relations. Relationships between union and management are important. They determine, to a large extent, how the parties will approach the bargaining process and whether the rights and obligations of the collective agreement will be fulfilled during the period of its administration.

i) Five Types of Bargaining Relationships

Experts in the area have identified a number of fundamental relationship patterns that define and shape the parties' bargaining behaviour. This classification system is based on a clustering of four interrelated attitudes: (1) the parties' motivational orientation toward one another (i.e., competitive, individualistic, or cooperative), (2) their beliefs about the legitimacy of the other's organization and its leaders; (3) feelings of trust; and (4) feelings of friendliness - hostility. Variation in these attitudes produce five major relationship patterns: conflict, containment - aggression, accommodation, cooperation and collusion.

Walton and McKersie in their classic book, A Behavioral Theory of Labour Negotiations, describe these five patterns as follows:

"Conflict. In this pattern the parties feel extremely competitive. There is essentially a denial of the legitimacy of the other party's ends and means. The company is determined to refuse to deal with unions if at all possible. It recognizes the union only to the extent imposed by law and union power. In the company's pursuance of this policy it is

constrained only by the letter of the law (as law enforcement feasibly can be brought to bear by government agencies); it is certainly not constrained by the spirit of the law. Coexistence is not a policy but a temporary state of affairs.

"It is not surprising then that the parties have essentially no positive concern for the other's internal affairs. They might, in fact, be inclined to destroy the other organization; they would at least be happy to contribute to the downfall of the officials of the other party, either company management or union leadership, as the case might be.

"Other attitudes are extreme distrust and hate. The parties correctly distrust each other's motives and actions; no quarter is asked and none is given. Their disliking for each other frequently assumes irrational proportions. Because of the prospect of irrational and extreme behaviour, the relationship is marked by considerable anxiety. ...

"Containment-Aggression. The parties are moderately competitively oriented. Recognition of the legitimacy of the other party could be characterized as "grudging acceptance". The union is determined to extend its scope of influence, and the company is insistent on containing the union's scope of action. In their choice of means the parties accept any limits of the law, including a minimum definition of the spirit of the law as they understand it. The actual content of bargaining tends to be confined to the traditional subject matter of wages, hours, and working conditions.

"Each has little respect for the other's officials and internal organizational processes, however, each would gladly weaken the organization or the position of the other's officials if this did not involve significant sacrifices of its own. Each party would not only be interested in gaining the allegiance of the workers but also in detracting from the allegiance enjoyed by the other.

"The parties regard each other with suspicion and are mutually antagonistic. Every action is scrutinized. Raw power plays are frankly expected and employed by both sides. ...

"Accommodation. The parties are individualistic in their orientation. Recognition of the legitimacy of the other's means and ends amounts to an "acceptance of the status quo". Neither party is driving hard to change the nature of the agenda of collective bargaining. They have adjusted to each other and have evolved routines for performing functions and settling differences.

"Each party has a moderate amount of respect for the officials of the other and pursues a hands-off policy with respect to the other's internal organization. There is little "competition" between union and management for the allegiance of the workers.

"The relationship is marked by limited trust...the level of affect among the participants is rather low - not strongly positive or negative. They go about their business, interacting in a courteous but informal manner....

"Cooperation. The motivational orientation is cooperative. There is complete acceptance of the legitimacy of the other. This pattern is characterized by the fact that the parties willingly extend mutual concerns far beyond the familiar matters of wages, hours, and conditions....

"There is likewise full respect for the other - its organization and officials. The union accepts managerial success as being of concern to labor; management recognizes its stake in stable, effective unionism. Inasmuch as each has found areas in which the other can be instrumental to its own objectives, it is likely to act in such a way as to strengthen the other organization or its leaders. Finally, there is a mutual trust and a friendly attitude between the parties generally.

"Collusion. The parties go beyond the question of recognizing the legitimacy of the other's ends and means. In certain respects they form a coalition in which they pursue common ends. In contrast to the cooperation pattern, the coalition and the ends it pursues are outside the law. Mutual attention is given to areas not really legitimate within the mandate of their respective principals (they violate the interests of employees or stockholders) or not really legitimate under the law (they violate the public interest).

"Close attention may also be given to each other's internal affairs as well, since they have maximum incentive to preserve the mutually profitable relationship designed to exploit some third party.

"Trust in the collusion pattern of necessity tends to be complete, since it is based on symmetrical blackmail possibilities. There is a disciplined avoidance of harming the other because of the risk of exposure. Although the parties are not exactly friendly, they do tend to be intimate; hence the appropriateness of the term "sweetheart relationship", which is often used in this connection."[4]

---

[4] Ibid., pp.186-188.

ii) Factors Which Influence Bargaining Relationships

What causes these relationship patterns? Generally speaking, there are four sets of determinants: (1) environmental factors, (2) personalities, (3) social ideologies, and (4) past and present bargaining practices.

Declining school enrolments and cutbacks in educational spending are probably the two most important environmental influences shaping the bargaining relationships between teachers and school boards. The phenomena of declining enrolments has resulted in teacher organizations seeking improved job security by demanding, at the bargaining table, surplus/redundancy clauses, seniority lists, lower class sizes and smaller pupil-teacher ratios - to name only a few of their demands. Because many of these issue areas were traditionally the preserve of unfettered board decision-making, some boards have interpreted these demands as being an assault on the board's right to manage the school system and set educational policy. In these situations, the relationships between teachers, trustees and administrators have become strained as the various parties to the negotiations become involved in a contest for power.

School boards have also been caught in a financial squeeze between rapidly inflating educational costs and spending restraints imposed upon boards by local property taxpayer pressures and limited provincial grant increases. To control escalating education costs, school boards have pursued various cost control strategies, like limiting employee benefits or even removing such benefits as retirement gratuities, cost-of-living allowances, graduate degree allowances and sabbatical leaves. A number of boards have tried to lay-off staff. The anxieties that accompany job insecurity, and the resentment that results from financial-belt-tightening have, in some cases, shifted cooperative teacher-board relationships into competitive-aggressive, and even full-blown conflict patterns.

There is no question that the personalities of key individuals, in particular those of the Director of Education and the two chief negotiators, have an important bearing on the relationship of the parties. An authoritarian personality structure - characterized by rigidity to change, power and status strivings, intolerance toward opposing beliefs and opinions, emotional coldness, and mistrust of others - often causes others to initiate a competitive or conflict relationship pattern to stabilize the situation. Persons low in self-esteem are also more likely to adopt a competitive or conflict relationship pattern because of their defensiveness, vulnerability to threats, need for greater structure, and fear of taking risks.

The ideology of an organization is another important variable affecting the parties' relationship pattern. A paternalistic orientation centered on a belief in "management's rights" is conducive to competition and conflict, especially when it comes up against a militant union ideology bent on stripping away all vestiges of management control.

Finally, past and present bargaining behaviours are important. In particular, the parties' relationship can be adversely affected by overly aggressive distributive bargaining tactics during the first stage of bargaining.

iii) Bargaining Strategies and Tactics

Some of the strategies and tactics used by skilled negotiators to maintain and promote harmonious relations are discussed below:

a) Creating a Positive Climate through the Expression of Attitude Similarity

The most direct strategy for building positive interpersonal relationships is for the parties to acknowledge and emphasize the attitudes they share in common. Attitude similarity usually increases feelings of interpersonal

attraction. We tend to like other people who hold the same likes and dislikes.

Skilled negotiators have evolved a number of tactics, even rituals, that help to preserve an atmosphere of goodwill. Negotiating meetings are usually prefaced by a period of informal discussion with the other side. The topics might include sports, kids at school, or a local social event. These conversations "break the ice"; they clarify at the beginning that the participants share common attitudes and experiences, despite being on opposite sides. Outside of the bargaining sessions, they may belong to the same clubs, work for the same charities, live in the same neighbourhood. The emphasis that collective bargaining places on differences must be counterbalanced by an emphasis on similarities. The brief moments just prior to the start of a collective bargaining session is an ideal time to create a congenial atmosphere for bargaining, to set the tone for future discussion. This tactic is simple and obvious. It is standard practice before any normal business meeting. Yet, it is surprising how often this rule of etiquette is broken in collective bargaining.

Another common tactic is to play down differences in language; in particular, by avoiding the use of "red-flag" words. One management negotiator was known for his insistence on using the term "pay" instead of "salary grid" or "salary schedule", which was the more appealing term to the other side. This irritated the teacher bargaining team no end because it became a symbol to them of the negotiator's pro-management attitudes.

A third tactic is to establish a superordinate goal. Improvement in the quality of education, greater teacher morale, more effective teaching - these are some of the common goals which both sides subscribe to. Ontario teachers are trained by their provincial organizations in the skilled use of this tactic. For example, the federations teach their negotiators to make effective initial bargaining statements that establish an early consensus on bargaining objectives.

These statements begin with a "non-controversial objective" (superordinate goal) and then use those areas of implied agreement to launch specific proposals. The following is an example of how a teacher negotiator might introduce a request for access to board information using a superordinate goal.

> "Mr. Black, I'm sure that the Board would concur that the free and unimpeded flow of information bearing on the operation of our school system serves the legitimate interest of everyone. This information helps the Federation to develop informed and constructive programs on behalf of the teachers and their students. The Federation would like to discuss its proposal concerning the rights and privileges of teachers to information."[5]

Or, in the case of improving staff morale:

> Mr. White, I think I can assume that the Board is just as interested as we are in seeing that the morale and enthusiasm of our teachers remain as high as possible. The availability of comfortable staff room facilities is an important factor in good morale. Therefore, the Federation would like to propose ..."[6]

This approach makes the Federation's demands sound reasonable because they take into consideration common attitudes toward the education system. It builds a good psychological climate prior to introducing a proposal that might otherwise appear objectionable.

Additional tactics for conveying the notion that both sides share the same basic values and attitudes include:

- tackling the easy issues first so that a spirit of cooperation can be established;
- reviewing, at each negotiating session, the successful progress that had been made up until

---

5 Taken from the Ontario Public School Men Teachers' Federation *Verbal Skills in Negotiation: Training Manual*, p.5.

6 Ibid.

that point and relating that success to the parties' good relationships, and their desire to reach a mutually acceptable settlement;

- expressing a common aversion to outsiders, i.e., fact finders, mediators, and provincial teacher and trustee organizations and their representatives. A teacher negotiator once remarked to a staff member of the Commission that the teacher and trustee negotiators were totally unable to communicate with the mediator, and were encouraged to reach a settlement if for no other reason than to get rid of the mediator toward whom both sides held such dislike;

- once a settlement has been reached it is customary for both sides to play down their gains and minimize their differences.

b) Making Short-Run Concessions

Showing cooperation and being willing to make short-run sacrifices in favour of building long-term goodwill is another general strategy for maintaining and improving relationships. Some of the tactics that would fall into this category would be:

- volunteering to include an item on the agenda that may have more benefit to the other side;

- settling grievances in the preliminary stages to express a party's good faith;

- volunteering to improve contract language;

- allowing the other side to claim victory if this is necessary to secure political support for ratifying the tentative agreement.

c) Extending Political Support to An Opponent

Supporting and strengthening the opposition leader's position within his own organization is another major strategy used to build an accommodative relationship. Some tactical examples would include:

- encouraging senior union officials to discuss the resolution of grievances;

- providing the chief negotiator with some advance information to assist him in performing his role, and looking good in front of his troops.

d) **Conferring Respect on the Opposition**

A fourth strategy involves conferring legitimacy, respect, or status on members of the other team. This is an area where many teacher and trustee negotiating teams run into trouble. Here are some common examples of the tactics teachers and trustees have used in the past which resulted in a further weakening of their relationship:

- insulting the other side by sending to the bargaining table individuals who have no authority to make decisions;
- showing contempt for the legitimacy of the teacher's federation, or the ability of those present at the bargaining table to represent the interests of teachers;
- indicating a disdain for participating in the collective bargaining process per se;
- approaching the bargaining process in a paternalistic manner;
- being insensitive to the other party's need to state its position with care and deliberateness,
- denying the opponent the right to have adequate time to analyze an offer and prepare a counteroffer.

A negotiator can show respect for the opposition by observing any of the following common courtesies:

- don't smoke in situations which would cause discomfort to members of the opposition;
- be punctual when attending meetings;
- honour your obligations and commitments, e.g., send letters out as promised, respond promptly to telephone messages, etc.;
- be a good listener, be patient, don't interrupt;
- be friendly, soft spoken;
- be honest;
- maintain a sense of humour;
- don't quibble;

- apologise when you are wrong;
- in general, appeal to the opposition's "finer instincts" and try to follow the "golden rule".

e) Dissociating One's Self or One's Opponent from Harmful Acts

A less pro-active and more reactive strategy for maintaining harmonious relationships is the technique of dissociating oneself from actions which the other side dislikes. It is a defensive strategy. Some of the common tactics include:

- blaming others who are not present at the bargaining table for the objectives or outcomes of bargaining. "We're not in favour of pursuing this issue, but we've been forced to by a militant membership." "The trustees want to make a settlement offer that protects the teachers' wages from the effects of inflation, but there are many poor farmers and senior citizens on fixed incomes who cannot accept large increases in property taxes."
- dissociating oneself from past actions. "We've all made mistakes in the past. This year both sides have resolved to improve the working relations among teachers, administrators and trustees."
- sometimes one side will try to assist the other in dissociating itself from a niggardly offer. "The teachers realize that the board's latest offer is low in comparison to the offers other boards have made to their teachers. Admittedly, our board may not have the same tax base as other boards, but we are confident that through continued hard bargaining and the expression of goodwill and cooperation that have become characteristic of teacher-board relations in this county, we will arrive at a settlement that is acceptable to both sides."

f) Using Rewards and Punishments to Shape Behaviour

The judicious use of rewards and punishments to shape the other party's behaviour is another major strategy in developing a successful bargaining relationship. The use of rewards can be particularly effective. For example:

- offering compliments to the other team for: adopting a problem-solving orientation, being well prepared for a meeting, making a balanced presentation, or extending a concession. Such compliments, if made in moderation by a party who already enjoys a good relationship with the other side, can shape behaviour, or at least point to an acceptable standard of behaviour;

- expressing appreciation, particularly through returning a favour or concession, can be a powerful reward. When a negotiator is confident that a concession by him will be reciprocated by an equally significant concession by the other side, trust-building and risk-taking can take place.

Although generally less effective, punishments can also be used to prevent an opponent from deviating from an accommodative relationship. Punishments, however, should only be used as a last resort to preserve or defend the relationship. The problem with using punishments is that they often call forth responses of the same kind and lead to an escalation of the conflict.

Generally, punishments should not be used to alter spontaneous behaviour, for example, the release of emotion. If used, they should be specifically directed at the conscious, tactical actions of the other team and their initiation or removal should be made contingent on the other party changing or stopping the undesired behaviour. Some examples of punishment tactics include:

- reminding the other chief negotiator that he is not living up to his role obligations. "These are not the bargaining tactics we expected from the Chairman of the Board of Education!" "Surely a professional negotiator can be expected to live up to his word. A deal is a deal!"

- making negative attributions about another negotiator's personality or professional competence. "Only someone completely lacking in integrity would try to pull a trick like that". "That's another blatant example of how teachers in this board care more about featherbedding and protecting jobs than they care about the welfare of their students".

- direct threats and sanctions, e.g., walking out of negotiations, refusing to make the next move, threatening harder bargaining next year, threatening to or actually filing bad faith bargaining charges or last offer and strike votes.

D. PROBLEM-SOLVING BARGAINING

In distributive bargaining the parties treat the issues as though their interests were diametrically opposed; in problem solving bargaining the parties approach the issues with the belief that both sides can gain from finding a solution to the problem. Although each side may not gain equally in the resolution of the problem, there is at least a possibility for joint gain.

The retirement gratuity issue provides a good example for comparing the kinds of bargaining outcomes that derive from distributive and problem-solving bargaining.

Teachers in the province of Ontario are granted 20 days sick leave per year. In addition, most school boards allow their teachers to accumulate the unused portion of their sick leave to provide protection against long term illness. To prevent the misuse of sick leave, most boards in the province established a gratuity which paid the teacher, upon his retirement, a monetary sum that could range up to a maximum of one half his final year's salary, depending on the amount of sick days accumulated.

However, after reviewing the report of an accounting firm commissioned to study the retirement gratuity issue (the "Wyatt Report"), the trustees now contend that the plan is an anachronism. They claim the payment of a retirement gratuity is no longer needed in view of significant increases in teacher salaries and the generous teacher pension plan now provided under the Teachers' Superannuation Act. In particular, the trustees are concerned that the continuation of the plan in its present form will, in their view, create serious unfunded financial liabilities for the board.

In terms of distributive bargaining, the trustees come to the bargaining table with the initial position that they want the retirement gratuity plan removed from the collective agreement. The teachers, on the other hand, hold firm, declaring this to be a strike issue. They feel this is a benefit they have struggled to achieve and they won't tolerate the board's attempt at "contract stripping". The resolution of this issue is frequently some form of compromise: a committee is struck to study the issue; the plan is "grandfathered", i.e., new teachers do not receive a gratuity or, the plan is "capped", i.e., the gratuity will not pay more than, say, $14,000.

Under problem-solving bargaining, the parties try to resolve the issue to maximize their joint benefit. For example, the teachers may be willing to give on the retirement gratuity issue in return for the board funding a long term disability plan that would protect new teachers who have not had an opportunity to build up their unused sick leave. Alternatively, a board might be willing to grant severance payments to redundant teachers in return for removing or limiting the gratuity. Removing the gratuity in return for a lower PTR would be another possibility for achieving a joint pay-off. The board would eliminate the gratuity and improve the quality of education while the teachers could improve their working conditions and increase their job security.

One of the major differences, then, between distributive and problem-solving bargaining is that in the former instance the parties consider only their own interests and battle their way through to a solution which often turns out to be some form of compromise, while in the latter case, the parties try to acknowledge their mutual problems and work their way through to novel solutions which satisfy, to some extent, the needs of both sides.

In the abstract, the problem-solving process involves three steps: (1) identifying the problem; (2) examining

alternative solutions and exploring their consequences; and (3) establishing priorities and making a decision(s).

In the first step, identifying the problem, the parties freely and openly exchange all information about the problem, as they perceive it at the time. A statement of the problem is then formulated in clear, specific terms. In step two, the parties create a set of possible solutions to the problem, and for each solution infer its potential consequences on the basis of the available facts. It is essential to this step that the parties thoroughly and accurately gather all possible information about the potential alternatives and approach the task in a sincere and creative fashion. Finally, in step three, the parties discuss candidly their own preferences and examine all of the solutions in search of one that best satisfies the needs of both parties.

For the process to work successfully, neither party should establish, at the outset, a "minimally" acceptable solution or impose arbitrary restrictions on the length of the search procedure. Each side must keep an open, flexible mind.

There are several factors that enhance the effectives of problem solving. Perhaps one of the most important is motivation. Both parties must be motivated to make the process work. Success does not always come easily. There will often be times when the parties will have to cycle through the process again: redefining the problem, exploring new alternatives, taking another stab at coming to an acceptable solution. Both sides must be patient, dedicated to resolving the problem, and willing to make short-run sacrifices.

Because sacrifices are sometimes required, there can be differences in the direction of the two parties' motivation, finding expression in: disagreements over the nature of the problem, suppression of relevant information, a disregard for certain alternatives, and disagreement over the type and

weight of criteria to be used in selecting a solution In addition, even if the parties are motivated in the same direction, the strength of the motivation may differ, and consequently, problems of coordination may develop. For example, a party with the stronger motivation to resolve the problem is more likely to make relevant information available at the bargaining table; will want to spend more time in searching for possible solutions; and will be more discriminating when it comes to selecting an acceptable solution. This asymmetry in the parties' dedication to working through the problem can create problems. One is reminded of a comment by a Director of Education who once said, prior to entering a problem solving process: "The board is going to give this 'love-in crap' a try, just to see if it works!"

A second important factor in promoting successful problem-solving is establishing an adequate flow of accurate information and using a common language. By information, we mean both factual objective information ("the numbers") as well as the more subjective, personal data like feelings, beliefs, attitudes, intentions, expectations, etc. Both types or levels of information are usually needed to get at the problem, and design effective solutions. A common language, involving shared meanings, is important in order to coordinate the implementation of agreed-upon solutions.

A third factor making for successful problem solving is trust, and its related concepts of openness and risk taking. A supportive, trusting climate encourages people to speak freely and spontaneously without fear that their statements will subsequently be held against them. It allows the parties to free up energies, which might otherwise be diverted to erecting personal and group defenses, to apply to the problem-solving task.

Trust levels are related to information flow. Someone who feels threatened is more likely to control the information he gives out, to be less open, less risk-taking. He is also more likely to be defensive and perceptually distort the information he receives through selectively attending or in-attending to certain statements, projecting anxieties and motives onto others, and so forth.

In the remainder of this section, we will briefly outline some of the major strategies and tactics the parties use to facilitate integrative or problem-solving bargaining.

i) Problem-Solving _ Strategies

a) Identifying the Problem

It is important to identify problems as early as possible, prior to the parties' positions becoming polarized and

entrenched. Most school boards have set up joint liaison committees with their teachers in order to identify issues early on. One board, for example, has set up a "Common Concerns Committee" composed of eight representatives, four from the administration, and four from the branch affiliate. The committee is to meet on a regular basis, normally monthly, to discuss "issues and matters of concern to either the Branch Affiliate or the Board". Although it is a consultative body, it has the right to invite resource people to its meetings and "make recommendations it deems appropriate in the circumstances".[7]

The purpose of these liaison committees is to identify emerging problems and effect some resolution of the matter in a problem-solving atmosphere, rather than allow it to develop into an emotional issue that could be carried to the negotiating table and dealt with by distributive bargaining procedures.

The presentation of a matter of concern is important. A teachers' group can approach a school board with an array of demands covering PTR, class size, seniority, and severance pay, or, it can approach the board with a set of problems relating to job insecurity, decline in teacher morale, and deterioration in working conditions. The first approach does not clearly express the teachers' needs and unilaterally sets out solutions. The second approach focuses on a party's needs and does not prescribe a solution. Experience has shown that the needs of both parties are more easily integrated when a matter of concern is expressed in terms of problems rather than solutions.

Problem-solving is also more successful when problems and solutions are expressed in specifics. Discussions that

---

7 Article 7.13.0.0.0 of the East York Secondary Agreement 1980-82.

involve abstract principles can lead to two sorts of difficulties. First, disagreement over principles frequently disappear when the parties get down to talking specifics. Mediators often try to reduce conflict by leading the parties' away from fruitless arguments over general principles and matters of philosophy. The second problem with discussing abstract principles is that consensus can obscure serious differences of opinion at the level of implementation. One of the keys to problem-solving is uncovering problems, of finding the real sources of disagreement.

Lastly, the ability to listen and ask questions in an informal, exploratory manner is extremely important for identifying and subsequently resolving the underlying problem. William F. Whyte has described the dynamics involved in active listening:

> "When a man states a point of view on which you disagree, there are two contrasting ways of meeting the situation. You can immediately bring in counter arguments to show him that he is wrong. Or you can express interest (not approval) in his point of view and ask him to tell you more about it. Why does he feel the way he does? What is behind his thinking?
>
> "These two moves lead in opposite directions. The first move leads to increasingly sharp disagreements, marked by brief and rapid interchanges, interruptions, and rising emotional tension.
>
> "The second move leads to relaxed tension and makes agreement possible. The man does not feel under pressure to get out a statement in a hurry and prepare for counterattack. He is able to talk to the subject and around it, in an informal, exploratory manner. Both parties are then better able to size up possibilities of getting together."[8]

b) Searching for Alternative Solutions

Effective problem-solving depends on the willingness and ability of each side to identify and mutually consider the

---

8 W. F. Whyte, Men at Work (Homewood, III: The Dorsey Press Inc. and Richard D. Irwin, Inc.,1961) p.332.

widest possible range of alternative solutions. Negotiators have developed a number of procedures that facilitate this part of the problem-solving process. First, it is common for one side to give the other some advanced notice of the issue it wishes to discuss. This lead time gives each side an opportunity to adequately study the matter and do some preparations for the discussion, to give consideration to a number of alternative solutions and to be able to enter negotiations with some clear ideas about what further information is needed.

Secondly, if at all possible, negotiators try to resolve complex issues away from the bargaining table. The time pressures and conflict atmosphere of the bargaining table inhibit joint, informal exploration of the issues.

A third procedure involves the proper sequencing of agenda items. Three factors are important here. The agenda should be structured in a logical, ordered fashion that is satisfactory to both sides. It is incredible, but sadly true, that a number of negotiations between teachers and trustees have broken down for no other apparent reason than the two sides could not come to any sensible agreement on the procedure for sequencing agenda items. Selecting items that have the greatest potential for resolution and placing them at the top of the agenda is a second important factor. By quickly establishing some initial successes, the negotiators can create a climate of optimism and a sense of momentum that can carry over into the negotiations on tougher issues. A third factor to keep in mind, is that the bargaining agenda should be kept flexible. New issues can be added if the discussions uncover new possibilities.

c) Establishing Priorities and Choosing the "Best" Solution

The parties must give themselves adequate time to complete the search process, if an optimal solution is to be selected. The best solution is usually not chosen under the pressure of time and the threat of sanction. In addition,

each side must be open about the costs and benefits of each alternative and honest with each other about their own preferences for a solution. This often means, in the case of management, releasing financial data and, in the case of unions, discussing internal political matters.

Finally, the "best" solution is one that allows each party some gain. This may be achieved, in part, by either breaking down an "all-or-nothing" problem into its component parts and making "tradeoffs", or linking various issues together into a total package that resolves the needs of both sides.

ii) Single Team Bargaining

Several school boards in the province have experimented with a form of problem-solving bargaining, called "single team bargaining". The concept was developed by Tom Crossman, now a consultant in London, Ontario, while he was working at Labatt's Breweries. The single team process tries to eliminate the traditional "win-lose" or adversarial style of bargaining by making a number of changes to both the structural arrangements in the negotiating room and the ground rules for bargaining.

What follows is a brief summary of the principles of single team bargaining and some of its advantages and limitations as seen by Tom Crossman.[9]

---

9 Tom Crossman, Single Team: An Innovation in Non-Adversary Bargaining with Emphasis on Improving Labour Relations. Unpublished manuscript, undated. For another example of problem solving bargaining see Roger Fisher and William Ury, Getting to Yes: Negotiating Agreement Without Giving In (Boston: Houghton Mifflin Company) 1981.

a) Structural Changes

Crossman found that the basic seating arrangements in a bargaining room can affect the atmosphere or climate of negotiations, often in a subliminal manner. The usual seating arrangement in adversarial bargaining is for the members of each team to line up on opposite sides of the bargaining table. From the moment the negotiators enter the room and assume their positions at the table, cues are emitted which define the situation as being one of competition, with the result that participants' subsequent behaviours often conform to this initial definition of the situation.

Crossman proposes to rearrange the physical structuring of the room to encourage a more cooperative atmosphere. In single team bargaining, the table is removed and the participants are usually required to sit interspersed in a circle, in comfortable arm chairs. The bargaining table serves no real purpose during bargaining except to act as a symbol marking a boundary between the two opposing sides. It encourages division. For purposes of writing, he found that negotiators had no difficulty in taking notes if they used a clip board placed on their lap. The circular seating arrangements allow all negotiators the freedom to see and speak freely with other negotiators in the room. Arm chairs are used so that arms can be rested by the sides rather than folded across the chest, which might connote a closed mind or uncooperative attitude.

b) Ground Rules

Crossman has established some ground rules for single team bargaining. Very briefly, these include:

1. Anyone may speak. In adversarial bargaining, members are not allowed to speak unless they get permission from their chief negotiator. The latter usually does most of the talking. The purpose of this rule, as discussed previously in the section on distributive bargaining, is to control or limit the communication flow; a team does not want to have any information transmitted to the opposing side which might weaken its bargaining position. Members of a team are even counselled to suppress any type of facial gesture or body movement that might give away clues to their real bargaining position. Single team bargaining, on the other hand, tries to free up the communication channels by encouraging each participant to speak openly. In fact, members who might be unwilling to contribute fully to the discussion are actively discouraged from attending the sessions. The full participation of everyone is necessary for the problem-solving process to work effectively.

Crossman has found that the expectation for everyone to contribute to the discussion has a significant impact on the behaviour of the participants. The members become more involved, and as they see themselves making meaningful contributions toward the resolution of a problem, their attitudes toward the process begin to change. Their initial caution gives way to excitement; their suspicions turn into enthusiasm; and people begin to feel good about themselves when they find their opinions are not only desired, but also respected. Team building is therefore promoted by encouraging everyone's involvement in the process.

2. Everything is off-the-record until the group reaches a solution. Nothing any member says is binding upon him or her. Everyone is entitled to change their mind.

This ground rule is extremely important for establishing trust, openness and risk-taking. It encourages spontaneity and gets the creative process working. Ideas are looked at objectively, and dispassionately. A stream of potential solutions are tried on for size, with no commitment to any particular solution being intended.

For this ground rule to work successfully, it is important for management to recognize right at the start of single team bargaining that they must be prepared to allow the union to back away from any solution which might cause them political problems with their membership. If a particular solution reached by single team cannot be ratified by the membership, management must not expect the union to hold to that solution. It must be discarded, and a new solution found.

3. Establishing constraints at the outset. Financial and political constraints must be stated openly at the beginning of the single team process, or prior to the discussion of an issue. Each party must also clearly state its priority issues, and its bottom line on these issues. This, of course, goes on in adversarial bargaining when the chief negotiators use sign language or private, off-the-record meetings to express their true needs. What happens in single team bargaining is that this information is identified and transmitted early in the process, therefore saving large amounts of time that can be used in searching for solutions that can be of benefit to both sides.

4. One team, not two. It is critical to the success of the single team bargaining process that everyone respect the needs of others, whether they be union or management.

One can easily detect when the members are functioning as a single team. The terms "union" and "management" are used infrequently. The pronoun "we" crops up repeatedly. The members become friendly with one another; they respect each other's constituency. An esprit de corps develops.

5. Random input. The participants are encouraged to use lateral thinking as opposed to vertical or logical thinking. Any idea, no matter how absurd it may appear at first glance, is carefully explored before it is discarded. This ground rule is also designed to reduce inhibitions and facilitate spontaneity.

6. Schedule large blocks of time. The problem-solving process requires large blocks of time to be successful. Hours of intensive discussion may go by before a breakthrough arises. Every participant must therefore be fully committed to the process and approach it as a full-time job. Other work must be postponed, indefinitely if need be until an agreement is reached.

7. Complete and accurate use of information. It is important that all of the participants have complete access to all information. Solutions should not be reached on the basis of rumour, emotional distortion, or inaccurate information. Adequate research is necessary for good decision-making.

8. The spokespersons for each side act as moderators of the discussion, not as chief negotiators. They try to keep the negotiations moving. The spokespersons will normally try to ensure that every member of the team has an opportunity to speak and be heard.

9. Satisfy the real needs. The single team concept assumes there is a need for greater employee participation in resolving issues affecting their jobs. It is a process that is designed to satisfy the real needs of people.

10. Put agreement in writing. When the team eventually decides upon a solution that is most acceptable to the group, it is put in writing, and then cleared with the two parties. The agreement is then presented to the constituents for ratification.

c) Advantages of Single Team

1. Single team bargaining encourages the parties when preparing their proposals to present problems rather than solutions (or demands). This prevents the membership from becoming fixed prematurely on one solution when alternative solutions may be equally as satisfactory, or even better. By keeping demands vague, members of the single team have greater flexibility for exploring solutions.

2. Experience indicates that management representatives are usually more willing to listen and to try to correct irritating practices when presented with problems rather than union demands that are arrived at unilaterally.

This procedure is less offensive to most management people. It is not as threatening. They don't get the feeling that they are being "run over" by the other side. They, too, want to contribute to the solution; to feel that they have something to offer. A solution that is reached bilaterally is also one that is better administered during the term of the agreement, because both sides have approved it and have an investment in seeing it work successfully.

3. The real problems are more likely to be discussed in single team bargaining because the phoney issues, or window dressing, are not carried into bargaining by the party representatives. The traditional thrust and parry of adversarial bargaining is absent. Showmanship, pretense, grandstanding, and insincerity are much diminished.

4. The climate of adversarial bargaining, i.e., feelings of hostility and frustration, are replaced by friendliness and trust. The use of innuendo, sarcasm, exaggeration and misleading statements are dramatically reduced.

5. The process encourages a cooperative problem solving atmosphere that may be carried over as an effective procedure for administering the contract.

d) **Limitations**

1. Single team bargaining cannot be implemented effectively in an atmosphere of mistrust and suspicion.

2. Complete openness is necessary.

3. Each side must be equally committed to making the process work.

4. Single team bargaining requires practice. It is unrealistic to expect immediate results. Sometimes it is necessary to move into the single team process gradually, either by first using it during contract administration or slowly incorporating successive elements of single team bargaining into each succeeding set of negotiations.

5. Single team is used more successfully for resolving working conditions issues, where solutions can often be found to satisfy the needs of both parties. Monetary matters are less easily resolved by single team.

6. Ratifying the agreement may be a problem. Some sections of the constituencies may harbour suspicions, believing single team to be a process of merely co-opting the interests of one side or the other. This is often the view held by the so-called "hawks" on either side. There may also be elements within either the teacher or board constituencies who have a vested interest in adversarial bargaining and would like nothing more than see single team fail.

7. Single team is more successful in resolving issues of local importance. Issues with provincial import are less easily resolved.

E. RELATIONSHIPS AMONG THE FOUR PROCESSES OF BARGAINING

In many respects the process of distributive (or power) bargaining is a polar opposite to the process of cooperative problem solving. The strategies and tactics required by distributive bargaining conflict with or contradict the strategies and techniques necessary for successful problem solving. In a very real sense, negotiators are faced with a dilemma at the outset of negotiations. They must choose which one of these two mutually exclusive processes they wish to follow. Once a decision is made to adopt power bargaining over cooperative problem solving (or vice versa) the types of strategies and tactics associated with the remaining two processes - internal bargaining and attitudinal structuring - become severely limited. Under power bargaining, for example, negotiators are not likely to be concerned that pre-negotiation membership expectations are at variance with those of the opposition. Nor are power bargainers likely to use pressures to revise membership expectations downward during the course of negotiations to bring them into line with those of the opponent. Perhaps of much greater concern to power bargainers are the problems of rationalizing failure and obscuring and misrepresenting the actual level of settlement. Attitudinal structuring techniques like expressing common values and attitudes, making short run sacrifices, and extending political support to the opposition are not generally followed by power bargainers.

Grasping the complex inter-relationships among these four bargaining processes represents an important key to unlocking the mysteries of collective bargaining.

THE STAGES OF LABOUR MEDIATION

The mediation process, like the negotiations process, can be separated conceptually into three general stages. In stage one, the mediator is primarily concerned with achieving acceptablility and diagnosing the situation. In stage two, the mediator uses his(her) understanding of the situation to devise various strategies and tactics that will facilitate the negotiations process. In the last stage, the mediator often has to create or apply pressures for settlement.

These stages, of course, are an abstraction. A mediator is always trying to analyze the situation as it unfolds. He is constantly processing information and sharpening his understanding of the underlying problems. Pressure can also be applied at almost any stage. Subtle, covert sorts of pressures may be used early in the mediation process while more aggressive and overt forms appear at the late stages, particularly just prior to or during strike or lock-out action. Although the three stages overlap one another to some extent they do describe fairly accurately the basic flow of the process.

In this section we will describe briefly the three stages of mediation to give the reader an overview of the process.[10] In later sections we will look at each of these stages in much more detail, concentrating on the actual strategies and tactics mediators use in each stage.

---

10 The following description is taken from Thomas A. Kochan, Collective Bargaining and Industrial Relations: From Theory to Policy and Practice (Homewood, Illinois: Richard D. Irwin, Inc., 1980) pp.279-282.

Stage I: Developing Acceptability and Diagnosing the Situation

"During the initial stages the mediator is primarily concerned with achieving acceptability, identifying the issues in the dispute, understanding the underlying obstacles to a settlement (the sources of conflict or impasse involved), the attitudinal climate between the parties, and the distribution of power within each negotiating team. The initial stages of mediation call for a relatively passive, questioning and listening role on the part of the mediator. Normally this takes place by meeting with the two negotiating teams and by shuttling between them to explore ways of getting the negotiations off dead center. In these initial stages, the parties will often lash out at their opponents, exaggerate their differences and the intensity of their resolve to stand firm on their obviously 'reasonable' positions, and try to convince the mediator of their own rationality and the stupidity or unreasonableness of their opponents. It is in these early separate sessions where the bonds of trust, acceptability, and credibility are either being established between the mediator and the parties, or the parties are beginning to form negative images of the capabilities of the mediator.'

"Clearly, the mediator is being tested by the parties. Some of the same grandstanding that occurs in the early stages of the negotiating cycle is repeated at this point for the benefit of the newest entrant into the process. These separate sessions also give the parties an outlet for their pent up emotions and frustrations. The biggest challenges for the mediator at this stage are (1) to accurately diagnose the nature of the dispute and the obstacles to a settlement, and (2) to get something started that will produce movement toward a final resolution. Both parties may be reluctant to take the first step (a mediator is often faced with the unhappy statement of one party that 'we made the last move so the next move is up to them', only to proceed to the other side and hear the same thing). The mediator cannot let the hesitancy of either party to move first stop the process before it is given a chance. Neither party, in all likelihood, wants this to happen, or the mediator would not have been called in the first place."

Stage II: Facilitating the Bargaining Process

"Assuming the mediator overcomes this initial strategic dilemma, the next step is to begin exchanging proposals and counterproposals and testing for potential areas of compromise. Note how important an accurate diagnosis of the underlying sources of conflict is. The mediator is now beginning to intervene more actively by trying to establish a framework and a procedure for moving toward a settlement. If the mediator has misjudged the underlying difficulties and tries to push the parties toward a settlement prematurely, or in a way that does not overcome some major obstacle, credibility and acceptability will be lost and the process will break down....

"During this second stage of the mediation process the mediator continues to probe in order to identify the relative priorities and bottom-line positions of the parties and keeps listening and questioning to find possible acceptable solutions to the outstanding issues. Once these proposals and counterproposals begin to be exchanged and discussed, the mediator attempts to determine whether the bottom-line positions of the parties overlap or are close enough to try to press for a modification that would produce an agreement. Here is where the accuracy of the mediator's estimates of bottomline positions become crucial to the process. Also, timing becomes crucial. If the bottom-line positions are judged to be close enough to push toward a settlement, the mediator may begin to take a more active, assertive, or aggressive role in suggesting actual compromises, pushing the parties to make compromises they earlier stated they would be unwilling to make, and in general, trying very hard to close the gap between the parties. Engaging in such active or aggressive tactics prematurely, however, that is, when the parties are really too far apart, when the pressure to settle does not exist, or when some political constraint stands in the way of a settlement at that time, ruins the credibility and acceptability of the mediator. The more experienced the negotiators are, the less willing they will be to allow the mediator to "push them around" in this way. The mediator will get the message quickly, unambiguously, and quite directly - someone may simply walk out! When conditions are not ripe for a settlement, the mediator must hold back (for the time being) from aggressive tactics - when the situation is ripe, a settlement may not occur unless the mediator engages in them."

Stage III: Creating Pressures for Settlement

"As the pressure for a settlement builds and the mediator senses that the time for the final push toward resolution is at hand, the aggressiveness of the mediator accelerates. No longer is the mediator spending as much time passively listening to the party's arguments and rationalizations or to exhortations about the problems with the other side. Instead, the mediator is negotiating hard with both parties, trying to get them to face reality and perhaps to adjust their expectations and bottom-line positions. The mediator may be more actively suggesting compromise solutions, yet being as careful as possible to avoid getting over-identified with a specific compromise or settlement point. The fear is that over identification with a solution that one or both parties reject also implies rejection of the mediator and limits his or her continued usefulness. Thus, compromises are proposed as "ideas" to consider, or as counterproposals the mediator believes he or she can get one side to accept if they would also be acceptable to the other side, and so on.

"The dynamics within each of the negotiating teams often changes at this point as well. Frequently, there will be differences of opinion within the team on the substantive issues, in the degree of militancy, and in the attitudes

toward the other party. At this stage the mediator will often look for support from the professional negotiators on each team for their help in dealing with the more militant of the team's members. Sometimes, the reverse is true as well. The negotiator will look to the mediator for help in dealing with the militant faction. In any event, these final-hour sessions often require that someone, either the mediator, the professional negotiator, or both, convince the hard liners that the best deal is at hand and that the final compromises necessary to reach a settlement should be made. Again, the importance of trust and confidence in the mediator is critical to the success of these final dynamics. The professional negotiator will want to be assured that, in fact, the best deal is at hand before attempting to convince the rest of the team that they should settle. Similarly, the mediator is going to be very reluctant to press hard for the settlement unless convinced by the parties that, in fact, their best and last offers have been put on the table."

STRATEGIES AND TACTICS OF MEDIATION[11]

This section on the mediation process is divided into three parts, each part corresponding to one of the three stages of mediation. Part I looks at the various strategies and tactics mediators use to develop "acceptability" and diagnose the situation. We look at how mediators develop trust and confidence; how they identify the real issues and how they discover the existing power structure.

Part II focuses on various mediator strategies and tactics that facilitate the four bargaining processes, i.e., distributive bargaining, intraorganizational bargaining, promoting harmonious relations, and problem-solving. Under distributive bargaining, for example, we look at how mediators prevent the parties from boxing themselves in with premature commitments and the various ways mediators facilitate the exchange of offers and counteroffers. Under intraorganizational bargaining we study such strategies as:

---

11 Much of the discussion on mediator strategies and tactics is based on the following writings:

Clark Kerr, "Industrial Conflict and Its Mediation", American Journal of Sociology, 1955, 60, 230-245; Kenneth Kressel, Labor Mediation: An Exploratory Survey (Albany: Association of Labor Mediation Agencies, 1972); Walter A. Maggiolo, Techniques of Mediation in Labor Disputes (Dobbs Ferry, N. Y.: Oceana, 1971); David A. Peach and David Kuechle, The Practice of Industrial Relations (Toronto: McGraw Hill Ryerson Limited, 1975) Chapter 6; Edward Peters, Conciliation in Action: Principles and Techniques (New London, Connecticut: National Foreman's Institute, Inc., 1952); William E. Simkin, Mediation and the Dynamics of Collective Bargaining (Washington, D.C.: Bureau of National Affairs, 1971); Carl M. Stevens, "The Analytics of Mediation and Arbitration - The Role of the Neutral - The Meaning of Neutrality" Prepared for the Research Program on New Methods of Collective Bargaining under the auspices of the Labor Management Institute of the American Arbitration Association, 1966; Eva Robbins and Tia Schneider, Denenberg, A Guide for Labor Mediators (Honolulu: Industrial Relations Center, University of Hawaii, 1976).

facilitating "off-the-record" meetings, and dealing with recalcitrant committee members. Under promoting harmonious relations we discuss a wide selection of tactics for reducing interpersonal conflict and building more positive relationships between the parties. Finally, we look at the strategies mediators use to encourage problem solving, for example by: setting up an appropriate climate, establishing ground rules and otherwise assisting the parties with identifying the issues, searching for alternative solutions, establishing priorities and making a decision.

Finally, Part III looks at how mediators exert pressure on the parties to settle, for example, by: using delays and deadlines to build pressure, reviewing the costs of strikes and lock-outs; and making public recommendations, if need be.

Taken together, Parts I, II and III should give a new mediator a fair idea of the kinds of problems he or she might face during a mediation case, as well as a wide selection of strategies and tactics from which to choose in order to cope with such problems.

PART I: DEVELOPING "ACCEPTABILITY" AND DIAGNOSING THE SITUATION

i) Developing Trust and Confidence

Gaining the "acceptance" of the parties is unquestionably the first and most important strategical move for the simple reason that it is a precondition for successfully carrying out other mediator strategies and tactics.

a) Clarifying the Mediator's Role

At the outset, a mediator should clarify his (her) role in order to remove suspicions and avoid misunderstandings that may crop up later, especially if members of either bargaining team are inexperienced in the process. The following is a list of some of the things a mediator may wish

to clarify at the first meeting. This list was composed by Eva Robbins, herself a labour mediator, after asking union and management representatives what they wanted mediators to say to their committees, and after discussing with mediators what they do in fact tell the bargaining committees at the first session.[12] As such, it is a composite list, and not all mediators would be inclined to discuss each point at such an early stage of the mediation process.

- "that the mediator is a neutral, attempting to help the parties reach an agreement acceptable to both.
- that the mediator will not dictate contract terms.
- that the mediator will hear both parties' arguments and justifications on the open issues, will ask questions and attempt to understand the rationale for the positions of the parties and the problems which led to the proposals. The mediator may evaluate the issues and positions, but will not take an advocacy role for either side.
- that, as it seems appropriate, the mediator will hold joint or separate sessions and will call or adjourn meetings as in the mediator's judgment appears to be warranted.
- that statements or positions received in private sessions will not be revealed to the other side without consent.
- that during the course of the negotiations the mediator might want to meet with the negotiator for the union without the bargaining committee present, or with the employer's negotiator without the other members of his negotiating team. They are advised of this early in the mediation in order to have no problem later when such private talks are held.*

---

12 Eva Robbins, A Guide for Labor Mediators (Hawaii: Industrial Relations Centre, College of Business Administration, University of Hawaii) 1976, pp. 35-36.

* Some mediators would not discuss this issue during the early stages of mediation; a few would say that it is best left unsaid.

- that if it appears advisable, the mediator may meet with the employer and union principal negotiators alone, without their constituents present; that this is common practice in labor mediation and recognizes that trying out ideas or solutions, in a private, non-binding, confidential session may well be the only way to break an impasse.*

- that disparate amounts of time will be spent in separate sessions with the employer or union, and the mediator does not expect that anyone will "run a stop-watch" on her; that the amount of time is not significant; what is meaningful is the progress made in talks and the parties' trust in the judgment of the mediator to go where the talks may be most profitable.

- that the bargaining committees in both rooms will at times be upset with the pressures applied by the mediator and there will be put to the test their faith in the mediator's neutrality as she seeks to modify positions. But that she must try to bring them to agreement and this is the way it is done.

- that employer and union committees might find themselves spending hours alone, while the mediator meets with the principal negotiators. While this is admittedly a bore, their acceptance of it will contribute to the settlement of the issues in dispute."

b) Establishing Ground Rules

For example:

- mediators commonly impose a media blackout; if not, all news releases or statements to the news media are handled by the mediator;
- anyone can advance a position without being committed to it;
- the mediator has the right to set the agenda in consultation with the parties;
- the mediator has the right to determine when the mediation process will be adjourned or terminated.

By clearly defining the mediator's role and handling the ground rules for mediation, one can eliminate future misunderstandings, establish appropriate expectations for the process, and reduce the tension and anxiety levels of those participating in an unfamiliar process. By starting the process in this way the mediator establishes an initial concensus on a minimal power base. The strong start to the mediation session also conveys a confident self-image and encourages the parties to believe the mediator is in control of the situation and knows what he or she is doing.

c) Actively Demonstrating Competence

Check with the ERC prior to going out in the field. The Field Services Section monitors local bargaining situations very closely and can give you a detailed understanding of the issues and personalities involved in the dispute. The Research Services Section has a wealth of data on settlements in the education sector. A mediator can sometimes defend against being "conned" by the parties by arming himself first with relevant information. Some mediators steep themselves thoroughly in the data so that they can later impress the local parties with their general knowledge of the issues in education. Others use the data in more

subtle ways. For example, some sit back and let the parties teach them the issues, but try to impress them with the speed with which they can absorb this "new" information and the adroitness with which they can formulate questions to draw out the relevant facts in the case. Either tactic can build credibility with the parties.

d) Demonstrating Empathic Understanding

Listen to each side carefully and demonstrate by word and gesture that you are actively listening. Paraphrase their arguments, seek clarification.

e) Being Neutral and Being Seen As Neutral

Each party will typically try to "win" the mediator over to its side by persuading him to accept the correctness of its own position and the unfairness or intransigence of the other side. It is very important that the mediator appear neutral, particularly in the first joint meeting, even if he feels personally that one side is in the wrong.

This does not mean, however, that the mediator does not have any opinions on procedural matters or on the terms of agreement that will most likely to lead to settlement.

f) Being Sensitive to the Needs of People

Most successful mediators develop an awareness of the needs and concerns of the bargaining team members. Quite often a negotiator will have an "individual agenda" which must somehow be taken into account in the formulation of a settlement. A member may want a particular issue resolved to his personal satisfaction before he will "bless" the settlement. Another member may be more concerned about gaining respect from other team members, or about developing a sense of participation in the settlement process. These needs whatever they may be in the particular case, cannot be ignored.

A mediator must also be sensitive to the impact his handling of the mediation process can have on the parties. For instance, whenever a mediator has been conferring in separate caucus with one party and wants to resume a joint meeting, he should normally confer briefly and separately with the second party before bringing the two sides together. There is an understandable curiosity on the part of the negotiating team that has been meeting alone about what has been transpiring in the other caucus room, and what step the mediator is planning next. To prevent suspicion and distrust from arising, the mediator should make an effort to satisfy each side's need to understand what is going on in the process. This point can be critical when a mediator is dealing with inexperienced negotiators, or has been caucusing with one side for a considerable length of time.

ii) Identifying the Real Issues

Perhaps the best way to get an understanding of the situation is to bring the two parties into joint conference and have them outline their positions and argue the various pros and cons. This has a number of advantages over meeting with the parties in private caucus. First of all, the mediator can rely on each of the parties to provide assistance in drawing out many aspects of the problem. They know all the "right" questions to ask; and they will quickly advise the mediator when they think he is being misled by the other party. Second, the mediator will be able to obtain valuable information as he watches each party respond under direct pressure from the other side. The overtones of the meeting will give him an indication of the underlying relationships which, in turn, may provide a key to resolving the dispute.

Experienced mediators usually classify the disputed issues mentally into three piles. The first pile includes all of the "must" items. These are the issues over which a party is willing to either strike or take-a-strike. The

second pile includes issues the parties are trying strongly to achieve, but which will ultimately be susceptible to compromise, postponement or even abandonment. The last group of issues are merely "throw away" items. They may be used to camouflage the real issues, apply additional leverage, etc. Most mediators tend to ignore these issues. Once the major issues are resolved these items will normally fall into place without much difficulty.

Generally speaking, a mediator discovers the real issues using indirection, for example by:

- developing a general understanding of the bargaining issues in education, and the special issues that have been of historical importance to the parties;
- asking each of the parties to verbalize their demands if there is a long list of issues in dispute; people tend to remember only what is important to them;
- probing the issues in private caucus - looking for the degree of intensity, and the degree of preparedness on an issue as a tip-off to the issue's importance;
- asking the other side about their "reading" of the situation as a way of gaining clues to a party's real priorities.

Discovering the real issues, however, is not always easy. Sometimes the parties have not thought out their own priorities. Or they may be reluctant to discuss these openly with the mediator for fear he might inadvertently disclose information to the other side which might undermine their bargaining position. The real issues, many times, aren't even on the table; they involve the satisfaction of personal feelings and needs.

iii) Identifying the Group Structure

It is not uncommon for a group to be dominated by one or two individuals. Together, in private caucus, they will do most of the talking, make most of the decisions, receive more deference from others in the group, and receive more

opportunities to initiate action than other members. These individuals will easily be identified by the fact that they characteristically talk for the group and to the group as a whole, while the less powerful members will normally talk as individuals and frequently to another individual (as opposed to the group as a whole). It is very important for a mediator to observe and respect this structure, and to respond to each member in the group in an appropriate manner.

Mediators have developed some commonsense tips for spotting the real leaders on the bargaining team (one cannot assume, a priori, that the chief negotiator is the primary leader):

- who addresses the group as a whole;
- who has an effective veto power over an idea?
- whose suggestions are most likely to be picked up and accepted by the other team members?
- if the structure is confusing, you might consider drawing the chief negotiators aside individually and asking them directly to assess the members on each team. Sometimes a chief negotiator will volunteer this information with a brief remark like: "Don't pay too much attention to Frank" or "Don't take him too seriously."

It is important to build a close working relationship with the group leader(s), because of their ability to influence the group. Mediators do this by:

- giving the leader the attention he or she deserves;
- reinforcing their leadership position within the group; sometimes this involves creating situations whereby their leadership is confirmed.
- reassuring the leader of the mediator's respect and support.
- being sensitive to the existence of factions within the committee and possible challenges to the group's leadership. For instance, if there are internal problems, a mediator will have to be careful how he or she probes the issues in separate caucus. Some issues may not be discussed openly without placing the leader at risk. A private meeting between the mediator and the chief negotiator may have to be set up.

PART II FACILITATING THE BARGAINING PROCESS

A. DISTRIBUTIVE BARGAINING

A mediator can play a very positive role in the distributive bargaining process by keeping the negotiations within productive bounds. Specifically, the mediator can keep the process fluid by preventing the parties from committing themselves prematurely to inflexible positions. He can facilitate the exchange of offers and counter-offers while at the same time protecting each side's bargaining position. Because of his broader experience and lack of emotional investment in the substantive outcomes of bargaining, he can be in a better position to identify and deflate unrealistic expectations. Provided he is given confidential information on the parties' bottom line positions, he can insure that they don't engage in a senseless unnecessary strike or lock-out in the mistaken belief that their positions do not or can not overlap. And finally, the mediator can assist the parties with interpreting sign language, arranging off-the-record meetings, and creating situations where they can gracefully retreat from once committed positions without losing face.

These, then, are the mediator strategies and tactics we will focus on in this section. But first, let us look briefly at some of the difficulties mediators face when attempting to assist the parties with their distributive bargaining.

It is not uncommon for teacher and school board negotiators to attempt to use the mediator as a lever to extract further concessions from the opposition. They will often try to disguise their own true position while striving to pry loose information from the mediator about the opponent's bottom line. You can usually expect them to use many forms of persuasion, including the use of bluff tactics. In rare situations, the parties may use deception, including the misrepresentation of facts, authority relationships and bargaining intentions. There have also been

instances where the parties have applied psychological pressure tactics, including the use of personal attacks, to disorient a mediator and undermine his sense of judgment and self-confidence. More common are the use of positional pressure tactics which structure the situation in ways that force a mediator into aligning himself with one party, often unknowingly.

When confronted with the problems of deception and personal attack, it is important for the mediator to separate the people from the problem. There is no point in "going after" one of the negotiators for using tactics which most people would find offensive. Question the tactic, not their personal integrity. Try to reform the process rather than the people who are in the process. This can be accomplished by focusing on the parties' interests, on why they are using the tactic. Is it really to their advantage? Is there an alternative strategy they could use that would be in everyone's interest?

In addition to following this general orientation, there are some specific ways that a mediator can defend himself against the use of these tactics:

i) How a Mediator Can Defend Himself Against The Parties' Use of Deception

On occasion, mediators have been given false information about bargaining trends: sometimes this has been due to an honest misunderstanding of the true state of affairs; at other times it has been an attempt to deceive the mediator. Most negotiators are open and honest and would be loath to lie to a mediator for fear of suffering a loss of personal and professional integrity should the deception come to light. But nevertheless, since these situations do arise from time to time, it is prudent for a mediator to be wary of factual statements. To guard against this kind of deception mediators never willingly accept one party's version of the facts without verifying them with the other party, or checking them against data from a neutral information source.

There have also been situations - rare though they have been - where a chief negotiator willingly allowed a mediator to believe he had full authority to make a compromise deal with the opposition. Once the deal was struck, the mediator was informed that the agreement had to be approved by someone else. Apparently, as future events disclosed, a plan had been cooked up in advance that whatever compromise was agreed upon, it would be turned down by the "real" authority as a way of getting a "second bite at the apple".

A mediator cannot assume, **a priori**, that each negotiator has equal and full authority to make a concession. He must be careful that agreement on an issue is not later turned into a floor for further negotiation. It is not only wise but also legitimate for a mediator to inquire, "for the record", into the exact limits of each negotiator's authority prior to mediating any concessions. It is also a common practice to prepare for contingencies by stipulating the ground rule that all concessions are "without prejudice" and should any subsequent deal fall through for any reason both parties are free to revert to their original positions.

Finally, there are times when the parties may mislead a mediator about their true intentions. For example, a negotiating team may reach a tentative agreement but be privately unwilling to "sell" it to their membership or the school board, as the case may be. They may just "sit on the fence" and sniff the political winds before committing themselves to a position. If membership resistance develops they simply bow to constituent pressure and reject a settlement they had only recently agreed to. Anyone with courage and integrity would defend the agreement, even if this required tendering their resignation from the team should the agreement be rejected by the membership.

Experienced mediators try to protect themselves and the process from the dubious intentions of one or both parties by developing "side bar" or "contingent" agreements which may be entered into either with the mediator or between the

two parties. With respect to the problem of "selling" the agreement, a mediator will usually call a joint meeting before adjourning the mediation and request each member on the two negotiating teams to commit themselves verbally to recommending the tentative agreement. In addition, mediators will often obtain a formal commitment. Two examples of such a memorandum of agreement are reproduced below:

Example 1

October 21, 1980

Memorandum of Agreement for 1980-81

This Memorandum declares that an agreement has been reached between the "ABC" Board of Education and the branch affiliate members of "X" and "Y" in its employ. It is understood that all matters have been settled and that no matters remain in dispute. Both parties agree to recommend acceptance to their respective principals. Further, it is understood that a news blackout on particulars of this agreement will be in force until after both parties to the agreement have ratified it.

_____ _____

(for the Board) (for the Teachers)

Example 2

Wednesday the 16th day of May A.D. 1979

Between

"ABC" Board of Education

and

The Branch Affiliate of the "X" Federation
Composed of Teachers Employed by the Board

The parties hereto hereby undertake to recommend to their principals settlement of the outstanding issues between the parties as follows:

[ ]
[a detailed listing of the]
[exact provisions]

Dated at "Someplace" this 16th day of May A.D., 1979.

For the Teacher Witness For the Board

ii) How a Mediator Sheilds Himself from Psychological Assaults

The strains and pressures inherent in the collective bargaining process sometimes cause members of a negotiating team to lash out at the mediator as a way of venting their emotions. This is to be expected. A mediator can play a positive role in facilitating the safe cathartic release of emotion that might normally be directed at the opposition. There are times, though, where a party will try to intimidate a mediator by placing him in stressful situations; sometimes this sort of tactic is designed to create a profound sense of anxiety in the mediator. It can confuse and disorient him and thereby cause him to function well below his normal ability. Through these psychological pressure tactics a party may hope to discourage "active" mediation or indirectly influence the opposition's "will to win" by undermining the effectiveness of the mediator and the mediation process.

Fortunately, these kinds of tactics are not used frequently by the parties, and when they are, experienced mediators are prepared for them. Much of their psychological effect is lost when a mediator becomes wise to these tactics, "accepts" them as part of the cost of doing business, and is prepared to patiently wait them out in the knowledge that, in the final analysis, it is the parties who must come to an agreement, not the mediator. Eventually the pressures inherent in the process will exert their force on the negotiators and bring them to the table for serious, responsible negotiations.

iii) How a Mediator Avoids Becoming Inadvertently Involved in the Parties' Pressure Tactics

a) The Take-it-or-leave-it Ultimatum

A mediator must be careful that he does not fall victim to the parties' bluff tactics. It is not uncommon for each party to exert false pressures on the mediator through all

manner of ingenious ploys and strategems. A typical example involves the "take-it-or-leave-it" ultimatum. When a party presents a mediator with its "last offer", it usually contains a cushion. The party's strategy is to convince the mediator of the genuineness of its offer by declaring that they are prepared to strike (take a strike) if the offer is turned down. The idea is to convince the mediator to take the ultimatum to the other side and use the credibility of his office, or his personal reputation and skills, to persuade the opponent into making a further concession. If the mediator should fail in his efforts to have the other side accept the last offer as legitimate, the party making the proposal is still in a position to make a graceful retreat, leaving the mediator holding the bag. It will be up to him to explain why he misjudged the other side's true intention.

This is a legitimate bargaining tactic that a mediator should be aware of. One way to avoid this particular pitfall, of course, is to insist that the party present its last offer directly to the other side in a joint conference. This can sometimes result in a party deciding to revise its "last offer".

b) **Meaningless Moves**

Both union and management will at times try to set a mediator up by making a number of meaningless concessions which still leaves its position far outside the range of reasonableness, and then argue that the opponent, by not making any concessions of its own, is bargaining in bad faith. This strategy involves duping an inexperienced mediator into accepting these concessions as meaningful and then convincing him to pressure the other side into accepting an unrealistic settlement figure. A mediator who falls for this tactic will rapidly lose his effectiveness.

Since negotiations do not take place in a vacuum, but are influenced by other patterns and trends set by or affecting employees in the same occupation or sector, a mediator can easily check whether a parties' last offer is

in fact within the range of reasonableness by obtaining comparative trend data. These data can then be used, if necessary, to challenge a party's assertion that it has made bona fide concessions.

c) The False Deadlock

A third tactic is for one side to call in a mediator during the late stages of bargaining when a deal is close to being wrapped up. Even though the parties could effect a settlement without third party assistance, the plan is to do a little saber rattling and hope the mediator can wring a few more last minute concessions from the other side. An experienced mediator should have no difficulty in seeing through this ruse. When a mediator discovers this kind of situation he normally goes along with the charade and tries to lean over backwards to impress each side with how hard he is working to get movement from the other side. Once a party is convinced the mediator has exhausted all possibilities for gaining further concessions, it is then ready to settle.

d) Being Pressured into Making a Judgment about "Fair Offers"

Quite often during a joint meeting with the parties, one side will try to put pressure on the other by asking the mediator to pass judgment on the fairness of an offer. This places the mediator in a "Catch 22" situation. Some sort of answer is expected, yet to make a judgment about the fairness of an offer would jeopardise the mediator's neutrality.

The way out of this box is for the mediator to skirt around the question. It really isn't important what he thinks is just or equitable; what counts is their opinion. After all, they are the ones who will have to live with the agreement, not him. It is up to them, and them alone, to decide what they think is acceptable.

Mind you, a mediator will often express his opinions about the relative merits of various offers or counter-

offers, but this is generally done in relation to trends in related settlement areas, and discussed in private caucus.

e) Being Pressured into Making Judgments about Bargaining in Good Faith

Mediators can also be put on the spot during a joint meeting when one party, usually after accusing its opponent of bargaining in bad faith, turns to the mediator and demands to know his opinion of the situation. Often this is just a rhetorical question that the mediator can let pass without a response. But if pressed to give his opinion, the usual counter is to say it is not his responsibility to pass judgment. His role is to assist them in getting an agreement. If they want a ruling on the matter, let them take it to the ERC, whose responsibility it is to make such quasi-judicial decisions.

f) Conditional Meetings

Quite often following a period of unproductive bargaining a party will threaten to either walk out of a mediation meeting or refuse to attend any further sessions unless the opponent changes his position. This tactic must be blocked. If accepted, it would essentially force the mediator to abandon his neutral role and don a negotiator's cap. To prevent such a move, the mediator can use any or all of the following tactics:

- advise the party that it would be absolute bargaining folly for the opposition to give in to such preconditions, and in all likelihood they won't, because to do so would only encourage a party to carry out similar threats in the future.

- if the opposition does concede on the issue, there is nothing stopping them from using their own countertactics, for example: interjecting new issues in dispute, hardening their position on other issues, or introducing further conflict into the relationship.

- if "sweet reason" is not sufficient, a mediator may have to "lay down the law". The mediator is acting on behalf of the public interest. It is his meeting and he shall determine when and where it will be held, and under what conditions a recess shall be called. If a party refuses to attend a mediation or walks out of a session, that is their decision, but they will have to live with the consequences. Refusing to cooperate with the mediator may adversely affect their public relations posture, create internal political problems, or even result in a charge of bad faith bargaining being laid by the oppositon.

g) The Instructed Committee

Sometimes a party will complain to a mediator that its hands are tied; that it has just recently been instructed by the membership (or school board) not to settle for anything less (more) than their latest offer. They claim that if the other side is unwilling to meet this demand, there is no point in continuing the mediation any further. Like the case of the conditional meeting, this is another

ploy to force the mediator into pressuring the opponent into making concessions.

To get around this obstacle, a mediator will usually begin by appealing to the pride of individual committee members, particularly the leaders. He may point out how unfortunate it is that the membership has no faith in their judgment and has decided to deprive them of their responsibilities as negotiators. He might ask them why the membership even went through the charade of selecting a bargaining team when a messenger boy would have been sufficient.

If this sort of ridicule does not get them off their mandated posture, then perhaps stressing the absurdity of their stance will. For example, if the teachers are holding out for 10% on the grid, would they turn down 9% plus improved fringe benefits? Highlighting the ridiculousness of their position is usually enough to cause them to caucus and abandon their position.

If they stubbornly adhere to their position the mediator can threaten to bring the two sides together and have the instructed committee advise the opposition of their predicament. In all likelihood the opposition would sail into them and then walk out of the meeting, bringing mediation to an abrupt halt. The instructed committee would then be faced with having to go back to the membership and report nothing more from the mediation session than the opposition's firm rejection. In almost every instance, this threat is enough for the party to call a caucus and then request the mediator to proceed in the normal manner.

h) Being Asked to Transmit an Irresponsible Offer

From time to time a mediator will run into a negotiator who will try to manouever him into conveying a completely irresponsible offer or suggestion to the other party. No mediator is obliged to transmit such an offer. In instances like this, he must act to preserve the respect and confidence of both parties by insisting that the negotiator convey the offer directly to the other party.

i) "Boulder-in-the road" Proposals

A "boulder-in-the-road" proposal involves one party refusing to discuss any other issue until a particular issue of importance to that party is first discussed and then resolved. A school board, for example, may refuse to discuss working conditions until salary issues have been resolved. Eva Robbins explains how mediators go about resolving this problem.

"Mediators first try to determine what produced the boulder issue in that form. Why is that proposal separated from the others and designated as a pre-condition to bargaining on the other issues? Why does a party to the negotiations paint itself into such a corner? Does it result from an existing contract provision which has been breeding anger for some time? Is it a power play, calculated to test the willingness or ability of the other side to withstand power? Does the proposal mask another, more basic, disagreement between the parties? Is the union negotiator who is making the proposal having difficulties within the union and trying to assert leadership? Is the employer's negotiator acting from personal conviction in pursuing a boulder issue or being pressured from above or below in the company hierarchy?

"Mediators dislike handling boulder issues. Talks on any other proposals are prevented and real negotiation of the agreement is put aside. Generally, a mediator's probing will produce no "give", especially if there is considerable time before contract expiration or another deadline.

"Yet such issues must be faced and mediators have employed various means of dealing with them. In one situation, where data on a boulder issue seemed incomplete and a study of current practices in the area seemed desirable, a mediator suggested that the parties name a joint committee of experts (not the principal negotiators) to serve as a fact-finding body, with another mediator chairing that committee. The first mediator was able to obtain agreement that talks on some of the less inflammatory issues would begin immediately, with the understanding that the boulder issue would have priority when the fact-finding committee completed its study. In that case, the suggestion was made within two weeks before contract expiration, when there was sufficient anxiety at the bargaining table to make the suggestion palatable.

"Other mediators find it effective to tackle the boulder issue directly, recognizing that no progress will be made unless there is an effort to resolve it. To intensify the pressure for settlement, mediators have adjourned conferences to dates closer to contract deadline. They also have tried to make progress by meeting in private sessions with only the principal negotiators, or have gone beyond the

negotiators to a higher company or union level, to point out the dangers involved in further delaying negotiation of the entire contract. One mediator in a particularly difficult boulder situation reported that he was able to persuade the principal negotiators to talk privately and frankly, with the understanding that if agreement could not be reached or even approached, neither side would be authorized to reveal the possibilities discussed, even to their negotiating committees, thus protecting their basic positions.

"Whether the mediator tries to roll aside the boulder issue or tries to meet and resolve it, as the contract expiration date nears, both parties may be greatly concerned that the issue will prevent contract settlement, provoke a strike or lockout, or harden an employer's decision to take a strike.

"One mediator claims that he has never hesitated, in such situations, to "go public", particularly when there is considerable public interest in the dispute. He has issued statements explaining precisely what stands in the way of the negotiation of the agreement and may cause a strike or lockout. He believes that the party which initially placed the demand on the bargaining table at some point meets difficulty within its own constituency and is quite willing to remove the issue if it can be done without losing face.

"There are no easy solutions. Many of the mediators who have handled cases involving boulder issues have emphasized the need to keep the talks going and keep the parties meeting until some kind of break appears. The real skill may be in recognizing that break, however subtle it may be."[13]

iv) Blocking Premature Commitments

Overcoming the use of deception, psychological assaults, and the parties' positional pressure tactics are reactive, or defensive tactics a mediator must perform, on occasion, in order to remain neutral and work effectively. A more pro-active and positive contribution to settlement can be achieved by preventing the parties from committing themselves prematurely to a position. Here is a list of possible tactics for keeping negotiations as fluid as possible.

- immediately impose a media blackout. Since experience has shown the mediation process can be adversely affected by media disclosure of inaccurate or incomplete information, it seems prudent to keep the process secretive and allow the membership

13 Ibid. pp.49-50.

opportunity to evaluate the tentative settlement at an appropriate time, i.e., when they can be presented with the entire package and be in a position to hear their negotiators' defence of the terms of settlement.

- establish the ground rule that agreement on any issue is tentative, subject to agreement on the total package. To further increase this incentive, some mediators impose the additional ground rule that any concession during mediation is "off-the-record". If the mediation is unsuccessful, all positions revert back to the parties' original positions prior to entering mediation. As the process unfolds and the concessions begin to accumulate, the parties develop an investment in seeing the mediation through to a successful conclusion. With each additional concession, pressures begin to build to prevent either party from assuming an inflexible, committed position. No one wants to risk sacrificing the gains already made.

- as chairman, the mediator has considerable control over the meeting. If it looks like a party is taking a line of argument that will ultimately lead to the adoption of a committed position he or she can forestall such an event by:

  - forcing the parties to move on to another agenda item;

  - asking the parties to break into private caucuses whereupon the mediator will meet with each party separately and try to calm them down and persuade them to be more flexible and open-minded;

  - keeping the parties separated and "carrying messages" back and forth. This allows the mediator to omit premature commitment statements;

  - calling a recess, perhaps for lunch or dinner, and hoping the parties will return in a better frame of mind.

It is not uncommon for a party to make threats to the other side as a way of expressing its commitment to a bargaining position. Sometimes these threats can backfire. Rather than cause an increase in pressure to give in, they may only strengthen the other side's resolve to hold firm. This can be the result of "hawks" and "moderates" within the team closing ranks in response to the external attack. The conflict can also be raised to a new level following the attack if the pros and cons of a particular issue are abandoned in favour of trying to save face: as not being seen as caving in to outside pressure.

There are several techniques a mediator can employ to avoid or defuse the inappropriate use of threats:

- a threat can be avoided if the party that is considering the use of threats is advised before hand of the potential detrimental effects. In addition to the points made above, a threat may be turned around and used to political advantage by the other party if it believes the threat to be a desperate attempt to shore up a weak bargaining position;

- if a threat can not be avoided, it can be ignored. It can be treated as a hasty, irrelevant emotional response under the strains of hard bargaining;

- if it can't be ignored, it can be redefined, perhaps as a warning;

v) Facilitating the Exchange of Offers and Counteroffers

The parties are invariably faced with a strategical dilemma in the second and third stages of bargaining. On the one hand, they are trying to explore the receptivity of various offers and counteroffers, yet on the other hand, they do not want to do anything that would jeopardize their bargaining posture. A mediator can play a very important role in protecting each party's bargaining position while at the same time facilitating the exchange of offers and counteroffers.

Eva Robbins describes the subtle art involved in carrying out this complex set of mediator strategies as follows:

"When a mediator enters a dispute the aim is to move the parties closer to each other through discussion of the issues, explanation of positions, examination of alternatives, persuasion and suggestion. Part of the function is to convey offers and counteroffers.

"This process is not mere mechanical message-carrying. The mediator uses the opportunity to discuss the implications of the offer with the sending and receiving parties. The mediator evaluates: May the offer be expected to produce a change in the other side's position? If the mediator does not expect that it will produce such change, should he or she tell that to the offering party? Does the offer as formulated indicate increased emphasis in one area of the

proposals and diminishing emphasis in another? Is the change in emphasis useful? How will the offer be viewed by the other side? Will it be seen as real progress which might be expected to step up momentum? Will it be a disappointment but valuable nevertheless in producing a more realistic look at possibilities?

"These and many other questions must be part of the mediator's evaluation of every proposal and counter-proposal made by the parties during the course of the talks. The confidential discussions of the separated bargaining committees may give the mediator who is privy to them the guidance needed to help the parties formulate their offers.

"After participating in many discussions, the mediator very often is able to make at least a guess as to the direction and issues on which movement may be expected and the kind of movement that might be required to produce agreement. Both parties seek that information from the mediator, even if they recognize that the response may be no more than mediator instinct. Thus, an employer's negotiator who is preparing an offer might ask the mediator which area would be best addressed: Is there a serious need, in the mediator's judgment, for obtaining something, however minor, on a specific proposed contract change? A union's negotiator preparing a counter-proposal, may ask the mediator what kind of movement will be most likely to produce an employer offer and, perhaps, whether the mediator knows the kind of movement the employer expects in the counter-proposal. And where the parties do not ask, the mediator sometimes volunteers that information.

"In the private sessions with the negotiators, or the separate sessions with full bargaining committees, mediators continue what they began in the first joint session. They seek to find out what the proposal is aimed at, what problem it is meant to cure, if what the party is seeking is attainable or even reasonable. They ask such questions as, 'if you had to give up this demand, what would be the effect on employees?' (or on the operations). 'What has occurred which makes this demand important enough to hang on to when you could perhaps buy something else if you withdrew it?' Talking with the committees, even general talk with one committee while the other is in caucus, continues the probing and exploration of an issue, perhaps creates a will to consider alternatives, and may contribute to generating a settlement psychology.

"Movement occurs in a number of ways:

1. Through offers and counteroffers made either directly or through the mediator.

2. As specific movement given to the mediator by a bargaining committee, with authorization to use as an offer only when, in the mediator's judgment, it will be useful in encouraging movement on the other side. For example, a union committee may authorize a mediator to 'Forget about demand No. 10, but don't remove it now. Use it when you "need" it.' Some mediators do not like to take such "authorizations" and try to protect themselves by checking its continued availability before using it.

3. As willingness to move in a specific fashion on a proposal, given to the mediator by a negotiator in private conversation, without authorization for use unless the mediator is persuaded that the balance of the proposal on that issue will be accepted.

4. As identification of demands which probably will be withdrawn or met in some acceptable form by the party receiving the demand, but at a later date; so identified, in confidence, by the bargaining committee or the negotiator, or to the mediator in a private session with the two principal negotiators.

5. As possible areas of further movement, very generally stated, given to the mediator in confidence by a bargaining committee, for the mediator's guidance only.

6. Through hints, "indications", obscure remarks, made to the mediator in private sessions with the principal negotiator(s). While this cannot accurately be described as

"movement" it is the kind of progress which can open doors for the mediator in discussing possible solutions with bargaining committees.

"How is movement induced? Sometimes it is induced by the clock, an imminent deadline, the anxiety of committee members, the mediator's direct request for cooperation of the negotiators. The tools are continuing dialogue, exploration and suggestion; and not the least valuable tool is the mediator hearing properly the sophisticated language and nuances sometimes employed by the parties.

"If mediators are persuaded that a demand is not obtainable, they tend to discourage bargaining committees from believing that it is possible to attain. If a mediator believes that at a particular point in the negotiations a specific proposal is considered by both sides to be a strike issue, it may be wise not to permit expectations to carry bargaining committees headlong into a strike. Mediators may disagree as to when and how to do this, but there rarely is a situation in which one side or the other should not be told that positions appear to be cementing in on the particular issue, and may be leading the parties into a strike that neither wants. Such a comment may induce a changed position or at least an indication that the position is not immovable.

"On money offers, mediators solicit movement in different ways, and it cannot be said that any one way is right and others are wrong. Before a money offer is made, a company may tell the mediator that it cannot, or will not, bid against the union's high demand and that unless the demand is reduced, the employer will stand pat. Sometimes no money proposal is made by an employer until the last day of negotiations, because there is no indication that the union committee will move materially from the initial demand or simply because that is the style of the negotiator. The mediator can point out to a committee that obviously an offer is contemplated, but cannot be obtained with the gap between positions remaining so wide. Or a union which wants to show willingness to move from its initial money offer without evincing weakness may authorize the mediator to advise the employer that a modified position will be forthcoming if an employer offer is received.

"In either such situation, the mediator is able to say, 'I have an assurance of an offer from the other side if you will change your position. I do not know how much change you think you need in the other side's position as a result of your offer. If the offer which results from your priming the pump seems to you to be inadequate, you can always stay put until a more manageable relationship between offers has developed. But it is time to start.'"[14]

---

14 Ibid, pp.51-55.

Edward Peters, a well known California mediator, has described the process in the following way:

"The conciliator goes one step ahead of the situation. He interprets and estimates the real position of each side as it is gradually unfolded to him, and conveys it to the other side in a positive manner. The parties indicate to the conciliator, to a greater extent than they would to each other, the degree to which they are willing to compromise. Often he has to pull it out of them. Through him they are able to explore the possibilities of a settlement without undermining their bargaining positions.

"Each side preserves a cushion to its breaking-off position, which it wants to feed out gradually in exchange for the cushion in the other side's breaking-off position. If one of the parties strips itself of its bargaining cushion too soon, and finds itself at the breaking-off-point at a time when the other party still retains a substantial cushion, it is at a tremendous disadvantage. If one of the parties concedes a point in an effort to get the other party to reciprocate, and the other party does not respond in kind, then the party which has made the effort has only undermined its bargaining position. Through the conciliator one of the parties can indicate a willingness to compromise, which he, in turn, can handle so skillfully that, if the other party does not respond, the bargaining position of the first is not weakened by the attempt. Oftentimes, the conciliator discusses with one party a compromise which he "hopes" to be able to "sell" to the other party. The party in the discussion knows very well that the conciliator would not be expressing these hopes if he did not have a green light from the other party. If it chooses to reject the compromise proposal it has only turned down the opinion of the conciliator. The other party's bargaining position remains intact.

"The parties do not tell the conciliator what their real positions are in so many words. They develop it in discussions with him as the situation progresses. They unfold it in such a way that he cannot be positively certain that they offered to make the specific concessions. The conciliator must interpret the offer to compromise, guess it as it were. The concession is conveyed to the conciliator in such a manner that he is left in some doubt. He is compelled to interpret it. This protects the party which makes the offer, even from the conciliator, if the other party doesn't reciprocate. There are many ways in which a position can be conveyed to a conciliator and yet leave him in enough doubt, so that the party indicating the willingness to compromise is protected....

"When there is a large number of issues in dispute, the process of reflecting the real pressures in the situation becomes much more complicated. The conciliator must first ascertain the one or more basic items which are the focal points of the conflict. His next step is to try to reduce the number of the differences. Very rarely is it possible to

dispose of the issues one at a time. The process can usually be facilitated by wrapping up various forms of packages.

"Sometimes it is practical to segregate the minor issues and wrap them up as a separate package before undertaking the major issues. Sometimes the reverse procedure is more workable; getting an agreement on the major items before wrapping up the minor ones. At other times it is most practical to try to wrap up all the issues, major and minor together, in one grand package. Frequently the union will hold back an agreement on the main issues until the minor ones have been disposed of, for fear that the employer will take advantage of the fact that it will not or cannot call a strike over fringe issues. On still other occasions both parties will resist attempts to clear away the minor issues first, if they feel the need of them to strengthen their bargaining positions on the main issues. Usually, where there are many issues, several of them are dummy proposals. A dummy proposal is one that the maker has no real expectation of getting but has introduced as a bargaining chip to be traded for something really hoped for in the negotiations.

"An example of some of the complexities involved in wrapping up a package may be shown in a dispute to which a conciliator was assigned, where there was a serious strike threat. There were seventeen issues listed - wages, and sixteen fringe items. Some of these were obviously dummy proposals which it could be confidently expected would be conceded at the approproate time. The employer was willing to make some moves to reduce the number of issues between them, but the union gave no indication whatever of reciprocity. The union took the position that it wanted to dispose of the wage issue first before making any move to clear off the fringe issues. The management asserted that its wage offer would be predicated on what concessions it would have to make on the fringe benefits. The union retorted that its own approach to the fringe issues would depend upon what kind of a wage offer was made by the management.

"In a separate discussion, the management indicated to the conciliator some of the fringe issues it was prepared to trade for fringe concessions by the union. In a separate discussion with the union committee members, the conciliator asked them to indicate to him, at least, if not to the management, what fringe issues they might concede. The union business agent explained that the union had set as its goal a wage settlement that was so substantial, that it expected and was prepared to strike for it. If the parties failed to agree on wages, and a strike were to follow, the union did not want to be stripped down to this single issue. It wanted its bargaining position during the strike to be reinforced with five or six of the fringe issues.

"Through a series of off-the-record discussions with the parties, the conciliator was able to wrap up a package of all of the fringe issues. This was to remain a confidential understanding with him, not to be officially acknowledged across the table. There was a further understanding with the conciliator, that if the wage talks failed and a strike took place, five of the union concessions on the fringe issues would be rescinded; it could then include them as strike demands along with wages.

"In another situation the parties were deadlocked on some nine issues. Both the business agent and the industrial relations director were determined not to make the first move, and were stubbornly trying to outwait each other. Finally, the conciliator in separate discussion with the industrial relations director said, "I realize that you feel quite strongly about all nine of these issues and are not disposed to concede any of them. However, can you indicate to me which of these issues you are especially concerned with? This does not mean that you are not also greatly concerned with the other issues, but can you segregate for me some of the issues which are the most important to you?

"The industrial relations director was too cagey to respond. Undoubtedly, he felt that the issues he did not mention would give the conciliator too definite an impression of a willingness to concede them. The conciliator then said, 'Well, if you are not inclined to differentiate between the nine issues, as to which ones are more important to you, can you give me some idea of which of them you think the union feels most deeply about?'

"This he was willing to do, and he noted a number of issues which he thought the union would hold to most tenaciously. The conciliator then took the same approach to the business agent, and got him to give his opinion of which issues he thought that the management would be least inclined to concede. It developed that with one or two exceptions, the issues which the industrial relations director thought that the union would be most adamant about, were issues that he thought that his own side might have to concede. The issues which the business agent thought the management would feel most strongly about were, with a few exceptions, those that the union felt it might have to

concede. Through this method the conciliator was able to locate the few issues that really were in doubt, thereby considerably reducing the area of difference between the parties.

"When the parties compel the conciliator to interpret their positions, and guess at what concessions each is ready to make at a given time, it would appear as though he were in a highly precarious position. Suppose, for instance, a union business agent were to say to the conciliator, 'The union is determined to accept nothing less that a 10-cents-an-hour wage increase and two more paid holidays. It is my belief that the wage issue is the big stumbling block toward an agreement. The membership is especially anxious to get the wages. See what you can do with it.'

"Let us assume that the intent of this remark is to indicate to the conciliator that the union is ready to concede the holiday issue, provided a satisfactory wage offer is made by the management. The conciliator then makes known to the management his belief that if it will make such a wage offer, the holiday demand will be dropped by the union. The management responds by making an acceptable wage offer, on the assurance of the conciliator that the union will concede the holidays. What is to prevent the business agent from taking advantage of the element of doubt with which he had conveyed his position to the conciliator, to deny that he had intended to give up on the holidays? Actually nothing, yet it almost never occurs. The effectiveness and very life of the conciliation function depends upon the good faith of the parties. The unethical practice of conveying a compromise offer through the conciliator by indirection, in order to use him to whittle down the position of the other party, is fortunately a rarity.

"The parties have a right to indicate to the conciliator a willingness to make a certain concession, and leave enough doubt about it in his mind to protect themselves in the event that the other party does not reciprocate in kind. The party which has so used the conciliator to convey the intended concessions, has then an ethical right to protect itself by taking cover behind this doubt to assert that the offer was never made. 'The conciliator must have misunderstood what was said, etc.' If, however, the offer is accepted, it would be the height of bad faith for that party to take advantage of the element of doubt with which it was given to the conciliator, and try to renege by saying it never intended to convey such an offer. No conciliator worth his salt would permit himself to be used in such an unethical fashion to chip away at the other party's position. It would be like a poker game in which one player tries to get a look at another player's hand without paying for it. Such a player will not remain long in the game if he vaguely indicates to a betting player that he will see him; and then having seen the hand, refuses to pay on the grounds that he did'nt intend to call.

"In some three hundred disputes the writer has never had a party renege when an offer given to him by hint or other

means of indirection was accepted by the other party. On two occasions it very nearly happened to him. In one instance the person who had reneged did not realize the position in which he had put the conciliator, and promptly rectified the situation when it was pointed out to him. On the other occasion it resulted from an honest misunderstanding."[15]

It is often said in collective bargaining that the "timing" of offers is very important. Sometimes a fair offer can be rejected because it has been made prematurely. Other times it can be ignored because the climate of agreement has past and the offer no longer looks palatable. A mediator, however, is usually in a strategic position to assist the parties in correctly timing their offers and counteroffers because of the confidential information he has pieced together from his probings of the parties in their separate caucuses.

A mediator can also contribute to structuring the offers and counteroffers to ensure a high degree of saleability. When packaging items for trade-off, it is fairly common practice for a mediator to outline first with one party what the opposition is willing to concede prior to stating the opposition's demands, which are typically phrased in less provocative language as "requests" or "needs". The issue of greatest importance to the other party is usually chosen as the leadoff concession.

vi) Deflating and Avoiding Unrealistic Expectations

Throughout the distributive bargaining process each party is trying to obtain clues about its opponent's bottom line while, at the same time, trying to disguise or hide its own. Typically, neither side really knows for certain what the other's bottom line is; it is mostly an educated guess, based on their analysis of the situation.

---

15 Conciliation in Action: Principals and Techniques (New London, Connecticut: National Foreman's Institute, Inc.,) 1952, pp.149-157.

It frequently happens that a party develops unrealistic or false expectations about what will be the final settlement point. A party may not understand the true value of an issue to the other side and therefore underestimate its opponent's commitment to a position. Some parties may be working with inaccurate statistics, or lack important data that would cause it to revise its expectations. Sometimes a party's expectations are completely wild and irrational because of inexperience or emotional stress.

The role of the mediator in these situations is to make sure the parties have a "rational" estimate of the other team's commitment to a position. On occasion, a mediator may have to actively deflate unrealistic expectations and correct erroneous beliefs. For example, a mediator might:

- refuse to communicate to an opposing party an unrealistic demand;
- question a proposal's legitimacy in private caucus or openly challenge it in joint meetings if appropriate;
- supply additional or new information, e.g., on settlement trends in surrounding boards, new cost-of-living figures etc., with the hope that this might revise expectations;
- or have a party place itself in its opponent's position (role play) to gain a different perspective.

A mediator must be careful, though, not to get "burned". This has sometimes happened when a mediator has tried to deflate a party's expectations on the basis of knowing the opposition's bottom line from confidential discussions with that side in separate caucus. As Eva Robbins has remarked: "Today's 'bottom line' may not be the same as tomorrow's. A mediator who is told the final position early in mediation, and who acts on that information later, closer to the expiration date, may find himself or herself in trouble." A party's perception of its bottom line fluctuates over the course of bargaining according to its assessment of power.

Experienced mediators are also sensitive to the possibility that a party may unintentionally create false expectations by simply making too large a concession, or making concessions too quickly on an issue. On occasion, a mediator has had to advise a party to delay making a concession to prevent the other side from becoming more adamant in its demands. A mediator may obtain a concession within the first five minutes of caucusing with a party but hold back from transmitting the concession until the time is more appropriate.

The appropriate timing of concessions seems to operate on two fundamental principles. (1) A party should have to "work" for its gains. A party does not appreciate the value of a concession that comes too easily. (2) If a concession is too large or comes too fast, the opposing side may be given a reason to revise its estimate of the other's strength and degree of commitment. "If they gave in this easily there certainly must be a lot more there to be taken."

vii) Face Saving

There are a number of instances during the distributive bargaining process where a mediator can be of some assistance to one or both parties in saving face. There are situations, for example, where one party has recessed the meeting, or simply walked out of it, and threatened not to return until the opposition makes additional concessions. Neither party will be in a position to call a meeting without their request being interpreted as a sign of weakness, and a signal that its bargaining position has changed. Should the opposition decline to make further concessions, the bargaining process will come to a full stop. The mediator, in this instance, allows both parties to save face by taking the initiative to invite both parties to attend a mediation session. Often times one of the parties will call the mediator and ask him to provide this assistance.

There are also situations where a dispute has dragged on for so long that a win-lose situation has developed, and no side is prepared, psychologically or politically, to accept the appearance of losing. In cases like this, some mediators will negotiate with each in a private caucus. Eventually, after shuttling back and forth between the parties, he will bring the positions of the two sides into line, and thereupon issue a set of recommendations which he presents as his own. Both parties can take comfort in the fact that they conceded, not to the pressure of the opposite side, but to the will of the mediator. Sending issues to arbitration or final offer selection are other methods of saving face. The arbitrator or selector can be blamed if the outcomes are not satisfactory.

At times, a party must be handed a plausible rationalization before it will concede on an issue. One mediator tactic is to persuade the party to view the collective bargaining process in a long range perspective. For example, if a school board has introduced a new demand but has been unsuccessful in getting it accepted by the opposite side, a mediator might try to rationalize this outcome by saying that it is unrealistic to expect that such a gain should occur the first time around. Normally, a party would have to develop a three or four-year plan whereby the only objective in the first year would be to expose the other side to the demand. In the second year, when the idea was no longer novel, they would push the objective further. And finally in the third year, when the opposition was accustomed to bargaining this issue, the objective would be to get the demand into the agreement. If one accepts this long range strategy, a party's current failure to have the new proposal put in the agreement is not a failure at all. They have their foot in the door, and they will have an opportunity to open it a little more next year.

Other common rationalizations include:

- there are not enough data to make a wise decision, therefore, the issue should be withdrawn until next year, at which time the relevant information will be available;

- if a party is committed to achieving a particular demand on the basis of principle, the mediator can argue the demand is not, in fact, a case in point of the principle;

- a concession that is made for the sake of promoting good relations, preserving the public interest, etc., does not indicate weakness;

- a concession is "rational" because the costs associated with continuing a particular dispute far outweigh the benefits;

- it does not make sense to put <u>everything</u> in writing - there will always be situations that arise which are unpredictable, therefore, one should go along, for now, with present practices, an offer of an informal verbal agreement, or a loosely worded clause. If problems develop, the two sides can get together and try to work things out according to the spirit of the agreement. If the parties are unsuccessful in redressing the problem either side will then have reason to adopt a harder line in subsequent negotiations. It will be able to point to past experience as justification for its demands.

B. INTRAORGANIZATIONAL BARGAINING

i) Facilitating "off-the-record" meetings

As negotiations enter the final stage, it is not uncommon for the chief negotiators and perhaps one or two other key individuals to go off by themselves and hammer out an agreement in a series of "off-the-record" meetings. Large committees, as any experienced negotiator knows, inhibit the free flow of information and the fluid give and take that is so necessary to making progress toward an agreement. However, this is a hard thing for other team members to accept. After playing such an active role in the negotiations, no one really wants to be "sent to the sidelines"; everyone would like to remain involved and participate in closing the deal.

Besides bruising the feelings of other team representatives, these private meetings can also generate suspicion and distrust. Is the chief negotiator going to trade off an issue that is of importance to one of the negotiators? Will the pressure of the moment cause the chief negotiator to "cave-in" and "sell the bargaining team down the river". Will he give up a membership demand in order to further his own career? If these feelings are not assuaged, some of the members may refuse to support the deal that is being worked out in the private sessions.

A mediator can facilitate these off-the-record meetings by:

- giving the members on each team some advance notice that such an event may occur at some point in the mediation proceedings;
- explaining the purpose and necessity of holding these private meetings. This is particularly important in situations where there may be inexperienced negotiators present.

- advising all team members that if the need arises to conduct a private meeting they will be so advised and kept informed of the status of the proceedings. This usually helps to dispel distrust and suspicion.

- having such meetings take place at the request of the mediator. This can take the chief negotiators off the hook with their own people, particularly if there are members present who would object to the chief negotiator making overtures in this direction.

If a mediator does decide to hold off-the-record meetings with the two chief negotiators it is almost standard practice to find something to keep the other committee members busy and feeling as though they are still involved. Sometimes a sub-committee can be set up to meet and bargain over some minor issues. Or the larger committees could be asked to undertake some type of fact finding mission the results of which would be fed into the private discussions at a later date.

At all times, the mediator should keep an eye on the mood of the larger committees, and he should encourage the chief negotiators to do likewise. If serious resistances develop, some alternative procedure must be used.

ii) Dealing with Recalcitrant Committee Members

There are times when one or two representatives on a bargaining team are obstructing an agreement. It may be someone who thinks their opinions are being ignored and wants to draw attention to their frustration by obstructing the final settlement. It might be a militant member who stands in the way because he thinks the team has not taken a hard line with the opposition. Whatever the reasons, a mediator must find some way to remove this obstacle. Here are some possibilities you might consider:

- have the recalcitrant member become involved in the negotiations. Find out what are his objections and explore ways in which his views may be incorporated into the agreement.

In otherwords, try to satisfy his needs.

- go over his head, if necessary, to exert pressures that will bring him into line.

iii) Engineering the Acceptance of the Union's Last Offer

A union negotiating team is much less likely to develop factional splits, and is subsequently more likely to recommend to its membership unanimous acceptance of the tentative agreement, if it believes that management has finally capitulated and accepted its last offer. Experienced mediators, who understand the importance of this for internal union bargaining, usually try to close a deal by having the union believe it has "won" the negotiations.

To achieve this the mediator first privately caucuses with management and convinces them to make various concessions which he then "holds in his pocket", i.e., keeps it in confidence. He then caucuses with the union and tries to bring the union's position into line with that of the board's last offer. Once this is accomplished, he persuades the union to allow him to present their position as a take it or-leave-it ultimatum to management. After staging a long caucus with management he comes back to inform the union that, after a great deal of bashing on his part, management has "reluctantly" acceded to their demands.

While management gives the appearance of having "lost" to the union, they are consoled by the knowledge that had they directly presented their last offer to the union it could well have created a new floor from which the other side would continue to whittle away.

On the rare occasion, a mediator will return to the management caucus with the union's ultimatum and find that they have had a change of heart. Now that they realize the union will come down to meet their last offer they want to squeeze a bit more out of the union by trying to back out of their previous commitments to the mediator and establish a

more ambitious bargaining position. At this point it may be time for the mediator to "read the riot act".

iv) Saving Face

The membership of each party has two basic types of expectations: one set of expectations concerns the substantive terms of the agreement; the other concerns the behaviour of its representatives. The teacher membership, for example, expects its negotiators to bring back an attractive agreement, and to have fought "tooth and nail" to achieve all that was realistically possible under the circumstances.

Mediators will often assist the parties in rationalizing the outcomes of negotiations to their membership. One of the standard techniques is for the mediator to issue a press release at the conclusion of an all-night marathon mediation session which applauds each side for its hard work and dedication to reaching an agreement that, in the mediator's judgment, should be acceptable to both sides. Although the outcomes of bargaining may not be exactly what the membership wants, at least the hard work and determination of their representatives, as reported in the press release, indicates their behavioural expectations have been met.

There are times when the cross-pressures within union or management are so intense the chief negotiator becomes afraid to make a decision for fear of either being secondguessed or in some cases, like that of a hired negotiator, even losing his job. He becomes overcautious, and consequently the bargaining process loses its necessary flexibility, and an impasse is reached. A mediator, in this instance, can take on the burden of advocating solutions to the issues. In some cases, this might involve making formal recommendations, even public recommendations. If a settlement requires that unpopular decisions be made, the mediator may have to play the "fall guy".

C. ATTITUDINAL STRUCTURING (OR MAINTAINING HARMONIOUS RELATIONS)

As you will recall from an earlier discussion of the stages of bargaining, the first phase usually involves a considerable amount of inter-party conflict. There are spirited exchanges between the two sides, a great deal of breast beating, and often bluntly worded threats. To the uninitiated observer it appears as though the parties are hopelessly at odds with one another. However, to the experienced mediator, this can mean little more than "grandstanding", "window dressing", or a "ritual dance". Often it requires no more than "babysitting" the parties through this stage of the bargaining. In some cases, though, particularly when inexperienced negotiators are involved, these displays of distributive bargaining tactics can degenerate into a win-lose situation. Positions can become intractable, and the interparty conflict can spill over into the interpersonal realm. As a result, personal animosities develop and escalate, tempers flare up, irrational statements are made, extreme positions are taken, and the gap between the parties' positions widen. Continued, fruitful bargaining is impossible under these circumstances.

i) Reducing Interpersonal Conflict

Here are some strategies and tactics you may find helpful in reducing interpersonal conflict.

- a mediator's presence at the bargaining table often has a sobering effect on the parties. He or she is an outsider, a representative of the public interest, and sometimes this is enough to restore dignity to the proceedings without anything further being said;

- if a mediator's presence is not sufficient, he can insist that order be restored. After all, it is his meeting the parties are attending, and as chairman of the meeting he has the authority to demand that certain rules of decorum be followed;

- sometimes a mediator may have to actively intercede to bring an end to the open display of hostilities. This can be achieved in various ways:

- to prevent "cross-fires", require that only one person, preferably the chief negotiator, speak at one time and then only when the other side has completed their thoughts. If there are experienced or knowledgeable chief negotiators present, look to them for support because they should realize that this suggestion will assist them in re-asserting control over their committee members. In a separate caucus you could press your point further by reminding the team that their lack of discipline will only lead them to reveal weaknesses in their bargaining positions; something that will no doubt lead to the loss of important bargaining objectives;

- remind the two sides their behaviour is unbecoming of their professional stature;

- guide their discussion away from topics involving personalities and focus their attention on the issues in dispute. Sometimes going up to a blackboard or easel and writing down the issues will get them to stop glowering at each other long enough to look more objectively at the situation;

- sometimes the use of humour can help to make a point, defuse anger, deflect frustration, or otherwise establish a cooperative atmosphere by getting everyone laughing;

- assist each side in improving their listening skills. For example, after one party has made their point, ask the other side to paraphrase the position that has been taken. Often the other party cannot paraphrase accurately what has been said because of the build up of many defenses which get in the way of listening. If a negotiator cannot paraphrase his opponent, encourage him to seek further clarification until his understanding is complete; the feelings of frustration and anger being experienced by the opposition negotiator will frequently subside to more manageable levels if he feels that he is being actively listened to and understood by the other side;

- don't let the parties' discussion centre on abstract principles that may be sensitive to each side. Often agreement may exist on specifics, but

arguments break out when discussions focus on "principles". By the same token, don't let the discussion move laterally in an unsystematic way. Keep them discussing one issue at a time and prevent them from dragging unrelated issues into the fray;

- try and get them working on an easy item that does not evoke much in the way of an emotional response. If agreement can be reached on these small issues, a spirit of cooperation can be developed and each party will be reluctant to reintroduce further hostile remarks for fear of destroying the goodwill and momentum that is developing;

- in circumstances where nothing seems to work, physically separate the two parties and let them "blow off steam". Try to facilitate the cathartic release of their emotions by showing sympathy, and infinite patience. After their emotions have dissipated, they can sometimes be brought back together in joint conference;

- if they cannot be calmed down sufficiently to resume joint bargaining, they can be kept in separate rooms and the mediator can carry messages between the teams. This allows the mediator to filter out vituperative remarks;

- in some cases, persons who become the target of uncontrolled ill will may have to leave the team before relations can be patched up.

ii) Building More Positive Relationships

Experienced mediators do more than just bring an end to the open display of hostility; they counsel the parties on how to go about structuring a more positive relationship. There are two main types of strategies that seem to be effective: (1) Encouraging the parties to emphasize their similarities and down play their differences. This strategy is based on the premise that people find it psychologically difficult to hold animosities toward someone with whom they share similar values and interests. (2) Encouraging the parties to reward cooperative and accomodative behaviour while carefully and infrequently punishing behaviour that deviates from this preferred relationship. Many of the strategies and tactics mediators use to promote more lasting harmonious relations are actually the same as any experienced negotiator would use on his own to develop better relations. The mediator, in a sense, is simply schooling the parties in how to negotiate: He is serving an educational function.

Here are some tips you may find useful:

a) Minimizing Differences

- Don't let the parties begin the negotiating session by emphasing their differences and/or immediately launching into an attack on the other side. Have them first try to create a congenial atmosphere in which to begin work. This can be achieved by keeping the initial discussions informal and focusing the conversation on topics that will bring out some of the attitudes and feelings that both parties share in common, e.g., their common concern for the children. This type of discussion not only creates a psychological pressure to shift the parties' interpersonal attitudes in a more positive direction, but it also creates a more favourable bargaining climate by reducing anxiety and tension which act as barriers to effective communication.

- Coach the two sides to avoid language or reasoning that emphasizes their differences. Discourage the use of "red-flag" words.

- Encourage the parties to relate their proposals to superordinate goals. That is, assist the parties in expressing their demands in a way that indicates how both sides can benefit.

- As items are being signed off, emphasize those issues which have resulted in mutual success. Assist them in understanding that both sides can gain in the bargaining process if they act in a spirit of cooperation and compromise.

- Teach the parties to sequence the agenda items in a way that builds a climate of success and optimism. Have them first develop a foundation of trust and goodwill that can be used later to tackle the tough issues. Inexperienced negotiators often forget to do this preparatory work. They go directly to discussing provocative topics that have little likelihood of being resolved easily.

- A mediator could also review at the beginning of each negotiating round the issues that have been resolved in the preceding session and emphasize, where possible, the implications this holds for the progress of negotiations and the new relationships that are emerging. It might be a good idea to have the parties discuss this on their own, prior to the start of a new session so that this becomes a matter of habit.

- Don't allow one party to bask in "victory". Clarify for them the importance of downplaying their own gains in order to avoid placing the negotiators on the other side in an embrassing position. Teach them that respect for your opponent is a necessary part of successful bargaining. An opponent who has been humiliated will usually try to redeem himself (at the expense of his opponent) when bargaining moves on to other issues, or other rounds in the future.

- The negotiating parties tend to acquire more positive feelings for one another after undergoing a common set of experiences or after enduring a common fate. Some mediator's try to provide the parties with a unique set of common experiences by having them participate in marathon bargaining sessions. The shared experience of hunger, fatigue, and the desire to complete the process can help bind the parties' relationship.

- A positive relationship can also be developed by making relatively minor, voluntary concessions to the other side. Settling grievances to the satisfaction of the other side prior to the start of negotiations is one way to improve relations; volunteering to improve contract language in order to facilitate the administration of the collective agreement is another.

- In society, generally, there exists a very powerful norm of reciprocity: one good turn deserves another. Experienced negotiators have realized that this norm must also operate within the collective bargaining process if the two parties are to maintain harmonious relations. Mediators can play an important role in teaching the parties the value of the **quid pro quo.**

- A school board or a teachers' union can go a long way toward building an accommodative relationship by assisting each other in strengthening their internal political positions **vis-a-vis** their constituents. For example:

  - a party should allow its opponent to "colour" their announcements about the outcomes of bargaining in order that they may look good in the eyes of their constituents.

  - in appropriate situations, a party can pass along to opposing negotiators information about certain key strategies and important developing situations. This prevents the opponent from being caught by surprise and looking embarrassed in front of its troops.

  - superior power should be used sparingly. Using a power advantage to gain every last concession from an opponent can sometimes jeopardise long term interests. If power shifts at some future date, as is often the case, the opponent may try to seek revenge.

  - an opponent should be treated with respect. An opposition negotiator should be allowed adequate time to present his position with care and deliberateness and his proposal should be dignified by allowing adequate time to analyze it thoroughly.

Once the parties have been able to establish a cooperative relationship, it is important to actively try to preserve it. This may involve a party having to dissociate itself from actions which weaken the relationship. Chief negotiators have been known to blame other members of their organization, or circumstances beyond their control (e.g., the "AIB", "Inflation", etc.) for positions they take at the bargaining table which would normally be thought of as being in opposition to the interest of the other side. Similarly, a chief negotiator may have to find some way of providing absolution for an opponent who is forced to pursue an objective that would weaken the relationship, perhaps by helping him to rationalize his position. Many times a mediator must actively work with a party to help it develop strategies which protect the purity of its motives or those of its opponent.

b) **Reinforcing Preferred Behaviour**

Behaviour that is conducive to a good relationship can be, and should be, reinforced. Experienced negotiators take advantage of opportunities to reinforce behaviour they feel will strengthen their relationship with the opposition. A negotiator should be prepared to extend compliments to the other side when it assumes a problem rather than an issue orientation, when it comes to the negotiating session well-prepared, when it makes a balanced presentation, and when it listens carefully to a proposal. These simple courtesies can be very effective in shaping the behaviour of an opponent if the relationship between negotiators is valued and the compliments are given out wisely, and in moderation. Even if the opponent does not value the compliments, they still convey to the other side standards of appropriate negotiating behaviour.

Expressing appreciation to the other team for their generosity or fair way of dealing with an issue is another form of reinforcement. Returning the favour on a subsequent issue is a particularly powerful reward. A series of these sorts of exchanges can very rapidly build a good working relationship because it establishes the benefits of risk-

taking and the existence of mutual trust.

The negotiating process offers many opportunities to reward an opponent for engaging in preferred behaviours. Unfortunately, the competitive win-lose character of many negotiations either blinds negotiators to these opportunities or leads them to believe that expressions of gratitude are somehow out of place. A mediator should be aware of the possibilities of using reinforcements for mature and responsible negotiating behaviour, and should not be reluctant to advise and counsel the parties on their use.

Punishment can sometimes be used effectively to preserve a good relationship, but only if it is used defensively, and if it is directed at conscious, tactical behaviour. Punishments, or the threat of punishments, have to be used wisely for there is a tendency for punishments to increase tensions and lead to a destructive pattern of hostile responses. To prevent this self-perpetuating cycle, the punishment must be directed to a specific form of deviant behaviour, and it must be made clear to the party that the punishment will not be invoked, or will at least be terminated, if the undesirable behaviour is changed.

Reminding a party that he is not living up to expectations is one form of punishment. Since most negotiators have a desire to perform well, to be seen as trustworthy, etc., inducing shame or questioning one's competence can sometimes be effective.

Direct threats like walking out of negotiations, refusing to make the next move, warning the other side of tougher negotiations next year, and threatening strike action are other forms of tangible punishments.

Each of these forms of punishment carry with them associated risks. Sometimes a mediator can be of service to the parties by diplomatically getting a party to examine, in advance, the possible consequences of its behaviour, including the possible invocation of punishments by the other side.

D. PROBLEM SOLVING

i) Setting the Climate

Mediators will usually try to promote a problem solving atmosphere right at the outset. It is not uncommon for mediators to schedule meetings at a neutral location, usually at a motel or hotel. Although there may be many practical reasons for this, e.g., the convenience of having caucus rooms, room service for meals, etc., one of the purposes of moving to a neutral location is to divest the physical surroundings of any cues that can trigger hostile emotions in one or both of the parties. This can sometimes happen when one party feels intimidated by having to negotiate on another's turf.

Meeting at a hotel also removes the negotiators from everyday responsibilities and distractions and allows them to concentrate more fully on the job at hand. In addition, it dramatizes the seriousness of the dispute and gives the mediator a better opportunity to set up off-the-record discussions.

When booking a room at the hotel, a mediator will often request a suite that has a comfortable chesterfield and one or two easy chairs. This can then be used at an appropriate time for holding informal, private meetings with one or two negotiators from each side.

Mediators usually wear casual clothing to lend an air of informality to the proceedings. Food and liquid refreshments are sometimes ordered, even if not strictly required, just to create a symbolic atmosphere of friendship and trust. At a subliminal level, people generally find it difficult to feel hostile toward others while they are in the process of sharing food.

The size of the bargaining team is usually controlled by the mediator. Large numbers of negotiators on both sides convey an impression of hostility and aggression. It is intimidating to speak in front of a large group. In fact,

one of the common intimidation tactics played by the parties is "body proliferation". Each side tries to out number its opponent in an effort to gain a psychological advantage over the other. A mediator can block this sort of tactic by arranging for small meeting rooms that limit the size of the teams.

The parties also try to intimidate one another by trying to compile the largest amount of supporting data. It may become necessary for a mediator to restrict the use of support documents and other materials by requesting the parties to meet for informal exploratory talks that do not require supporting material.

There are, of course, other tactics a mediator can use to reduce conflict and establish a problem solving climate. Many of the mediator tactics discussed in the previous section on promoting harmonious relations are equally relevant here.

ii) Establishing Ground Rules

A mediator will usually create ground rules that facilitate the problem solving process. For example, a mediator may inform the parties that anyone can state a position or solution in joint meeting without being committed to it, and that evaluation of any solution should wait until all possible solutions have been brought out for discussion. And further, he may stipulate that every item agreed to is tentative, subject to agreement on the total package. In private caucus, a mediator will always advise a party that statements or positions divulged to the mediator will not be revealed to the other side without prior consent. These sorts of ground rules keep the discussions fluid and flexible.

Since problem solving also requires scheduling large blocks of time, a mediator will usually insist that both parties commit themselves to the process, even if this means continuing throughout the night in marathon bargaining if need be. A mediator will sometimes request that the teachers' committee be given time off from teaching duties so that

they can devote themselves to finding a resolution to the impasse.

It may become necessary in the final stage of bargaining to "buy" more time to reach an agreement. A mediator, for instance, might want to request the parties to delay taking a last offer or strike vote, delay the announcement of such result, or even postpone the timing of a strike or lock-out in order to continue the problem solving process. The removal of these threats may increase the likelihood of a settlement being found at the last minute. In general, the parties are not aware that votes and sanctions can be delayed, so this is something the mediator should be prepared to discuss with them.

iii) Building a Common Data Base

A sound information base is a prerequisite for good decision-making. Without complete and accurate information, it is most difficult to identify the real problems, develop feasible solutions, set realistic priorities and make rational decisions. Nonetheless, because of the nature of bargaining, the parties frequently neglect, and at times are unable, to ensure they are working with a sound knowledge base. Important information is often withheld from the opposition for strategical reasons, time restrictions impose serious limitations on opportunities for fact gathering, and bargaining pressures typically result in the perceptual distortion of available facts. It is not uncommon, therefore, to find negotiators confusing facts with inferences, or exaggerating, over-reacting, or jumping to conclusions.

As chairman of the meeting, a mediator can guide the discussion in a way that facilitates the development of an accurate information base. This can be achieved, in part, as follows:

- encourage the parties to consider all possible sources of information;
- check for information gaps;

- develop some method for checking the accuracy of the information, don't assume its accuracy;
- synthesize the information, if necessary;
- obtain agreement from both parties, where possible, on what constitutes a "fact";
- seek a consensus on the interpretation of the facts;

iv) Improving Lines of Communication

A mediator must have a sharp eye for detecting barriers to good communication. The following is checklist of some of the common problems:

- a negotiator becomes confused by a welter of facts and supporting arguments and as a result, loses sight of his opponent's central idea. (A mediator can sometimes correct this problem by summarizing the discussion on a topic and focusing attention on the crucial idea.)
- a party evaluates another's position prior to gaining complete comprehension of the position. This often happens when a negotiator gets over stimulated and wants to jump right in without hearing the other side out. (A mediator might request the over-anxious negotiator to withhold his evaluation until he was able to paraphrase accurately his opponent's position.)
- points are not discussed in a reasonable manner, but are dismissed summarily through abuse or power tactics. (The mediator can control the agenda or probe the uncooperative party in joint or private caucus for further justification for its position.)

Communication can also breakdown because of:

- perceptual distortions (the overbearing nature of one negotiator causes another to focus his attention on the style of presentation and not on the content).
- false assumptions (an ultimatum is ignored under the false belief that the negotiator delivering the ultimatum does not speak for a majority of his constituents).
- physical stress (attention wanes as negotiators become tired, hungry, etc.).
- value conflict (negotiators often ignore or distort communications which conflict with values they hold important).

- antagonistic or hindering behaviour (e.g., consistent blocking, digressing, hair splitting, disrupting, joking, debunking, etc.).

v) Problem Identification and Assessment

In the course of a dispute between teachers and school boards it is not uncommon for a simple event to escalate - via all manner of false assumptions, fears, and irrational beliefs - into a dispute of major proportions. A school board, for example, may incorrectly forecast September school enrolment and, as a result, not hire sufficient teachers to conform to past staffing practices. The teachers, perhaps mistrusting the board, may jump to the false conclusion that the school board has made a conscious decision to alter staffing practices. Rumours may develop that the board is planning widespread cost-cutting measures. Fears may develop among the teachers that some will lose their jobs, those that remain will be forced to bear an increased work load, while the students may suffer a decline in the quality of education. The issue can escalate from a narrow problem or grievance into a flag-waving affair involving emotionally charged matters of principle and philosophy.

A mediator will usually try to de-escalate the dispute by bringing the issue down, in a step-wise manner, to the real causes that lie at the root of the problem. With each restatement of the problem, the mediator tries to winnow out the various false assumptions, and irrational fears that are responsible for escalating the dispute.

After separating the symptoms of a problem (which are often expressed in the form of bargaining demands) from its true causes, a mediator will try to determine or weigh the relative importance of various problems vis-a-vis one another. Quite often no one on either bargaining team has seriously tried to sort out these problems and establish any priorities. There are a number of useful questions mediators can use to come to some decision about priorities.

1. How **urgent** is a particular problem? Must action be taken immediately or can a decision be postponed until a later date at which time the full dimensions of the problem will become apparent and further discussion can take place?

2. How **serious** is the problem? How many jobs or people are involved? How much will it cost to resolve? Does the magnitude of the problem justify this much attention?

3. What is the **history** and **projected future** of the problem? How long has the problem existed? Is it becoming progressively worse? Or is it diminishing, resolving itself as it were, and therefore requiring no active intervention?

Once these sorts of questions have been answered the parties are in a better position to set priorities, concentrate their energies on solving the important ones, while setting aside or even abandoning efforts to resolve ones that are of lesser importance.

vi) Searching for Alternative Solutions

There are a number of techniques mediators use to assist the parties with their search for alternative solutions. Some of which include:

- brainstorming or lateral thinking;
- switching from "either-or" thinking (which tends to over-simplify situations by reducing them to dichotomies or polar opposites) to synergistic thinking (which involves paradoxes, fusing opposites into a unified whole, etc.). The aphorism, "the meek shall inherit the earth" is an example of synergistic thinking;
- shifting the level of discussion from the specific to the general. This allows the participants to expand the scope of their thinking and increase the possibilities for creative discoveries;
- suggesting solutions for the parties to "try on for size".

The last technique, suggesting alternatives, requires elaboration. Some mediators are concerned about offering

recommendations lest they be rebuffed by the parties and suffer a loss in acceptability. Perhaps equally important, they believe the parties need to feel ownership of an idea. They must think the solution is their own for it to be acceptable. To get around these two problems, some mediators have developed a process called "seeding" whereby a mediator inserts into a conversation the beginnings of some new idea, or doubt he has about the ability of a party to succeed in achieving its current goal. When planting the "seed" the mediator often adopts the same manner of speech and body language normally used by the party or more specifically, the leader of the negotiating team. By doing this, the mediator communicates an idea without arousing anyone's defenses. Their comfort level remains high because they are hearing their own words played back to them. Most of the time, these ideas or doubts do not register at a conscious level. They take root in the subconscious, and in time, germinate into a full-fledged alternative solution. It takes a while to take effect because people generally need time to develop and grow accustomed to new ideas. They have to "sleep on it". If a mediator is skillful and patient he can very subtly introduce new ideas virtually unbeknownst to other members of the negotiating teams, only to observe someone in the group introduce this same idea, or something very close to it, as his own at a later date.

There are other mediators, however, who are equally effective but much more direct in their efforts to get the parties to explore alternative solutions. They see no need to use finesse. One mediator comes right out with a type-written list of articles which he claims will be the eventual agreement, or at least something that will be very close to that agreement. The objective is to directly confront the parties with alternatives and make them defend their positions or suggest alternatives to the positions being taken by the mediator. This is a much more intense, dialectical process, but nevertheless, it can be used quite successfully.

III CREATING PRESSURES FOR SETTLEMENT

Seasoned mediators use the pressure inherent in a situation as leverage to induce the parties to re-examine their expectations and priorities, and to move on their positions. If the normal pressures are absent, an experienced mediator will try to generate pressures of his own. Some of the strategies and tactics mediators use to build up a head of steam will be discussed below. These tactics are particularly important to keep in mind if the negotiations look like they could be headed for a strike or lock-out.

i) Using Delays and Deadlines to Build Pressures

An excellent illustration of the kinds of delay tactics used by FMCS mediators is provided in Joseph Frees' study, Dispute Management in Labor Relations: The Mediation Process

> "A mediator may use delaying tactics of his own in order to let the natural pressure in the situation build up. If the negotiations are stalled in the first phase, and if the mediator has found the parties unresponsive to his probes and suggestions, he may take advantage of his position as conference chairman to sit back and 'wait them out'.
>
> "He may bring the parties together for a joint conference, then let them argue fruitlessly and repetitively, letting them sink into the experience of deadlock, letting them feel the frustration so engendered. He may keep the parties in separate caucus, letting them remain apart for long periods.
>
> "He may sit with one or the other, going over the issues, probing, suggesting, or just listening; or, he may leave them both alone, neither party quite sure where he is or what he is doing. He can then return to his office, or take a coffee break, or make phone calls. Finally, he may adjourn the session for the day, perhaps on a pessimistic note, suggesting that no further meetings be scheduled until there is some significant movement. He can then keep in touch with the chief representatives by telephone or private meeting, and continue working on the case that way.

> "These various delaying tactics are effective in direct proportion to the "external" pressure on the parties to settle. This pressure may be in the form of a strike threat-cum-deadline, or the economic and political effects of an on-going strike. It may be in the form of public opinion, criticizing one or both sides for failure to settle the contract. This was a common form of pressure in teacher negotiations, where both sides paraded arguments and commentary through the press, public meetings, advertisement, or "informational picketing". Finally, pressure may come from the principals, either employees or management, to get the contract settled so that they can get on with business and make plans for the future."[16]

ii) Placing the Responsibility for Settlement on the Parties' Shoulders

In the same study, Frees goes on to point out that:

> "Another form of pressure available to the mediator is to emphasize to the parties that it is their responsibility to construct a workable settlement. A recurring theme in the mediator's comments early in a stalled case is that, "There's no magic in mediation, fellas. I haven't got a magic wand; I can only work with what you give me." Used in conjunction with mediator-induced delay, this line of argument is designed to open the parties to the mediator's probing, and to make them more responsive to his suggestions. A mediator can use the very limitations of his position to put pressure on the parties."[17]

iii) Marathon Bargaining

Marathon bargaining works best when the negotiations are close to a strike/lock-out deadline (i.e., there are other pressures for settlement), an agreement is in the "air", and a mediator does not want to lose momentum. Marathon

---

16 (Ann Arbor, Michigan: University Microfilms International) 1976 pp. 401-402.

17 Ibid., pp.406-407.

bargaining sets up two major sources of pressure. The first, and most obvious, is that it physically and emotionally exhausts the participants. It makes them look at the situation differently. They tend to reassess their needs and define new priorities. Whereas the attainment of abstract principles was previously considered crucial, the participants become more concerned with satisfying lower order needs, like getting sleep and returning to normal surroundings. The second source of pressure comes from the expectations for settlement that develop among members of the negotiating teams and the larger constituencies. If the participants are serious about trying to achieve a settlement, there will be pressures to make marathon bargaining successful. No one will want to see the mediation process fail.

iv) Using Coercive Comparisons

A number of mediators like the parties to examine settlements in surrounding areas. Although the parties may know about these settlements they may be unwilling to face them. These comparative data are "coercive" in the sense that they can deflate unrealistic expectations. They convey to the parties a sense of the futility of trying to break out of the patterns or trends that have been established. The pressure of these comparisons can be increased further if it can be shown that arbitrators are likely to use these trends in making an award, should the strike end up being resolved by arbitration.

v) Reviewing the Costs of a Strike or Lock-out

It is sometimes necessary for a mediator to force the parties to consider the costs associated with strike or lock-out action. When dealing with either the teacher or board negotiating team, the mediator may wish to emphasize the following possibilities:

a) if past experience is any indicator, a strike could last as long as 40-50 instructional days.

b) a great deal of public pressure will be brought to bear on both parties for subjecting the children to a loss of education. The media will focus on the dispute. Parent groups will become actively involved in lobbying for settlement;

c) it is not uncommon for incumbent school trustees to be defeated in elections subsequent to the strike. Some trustees have simply refused to run for re-election because of the abuse they have suffered during the sanctions;

d) the teachers are likely to lose a great deal of salary if the strike is prolonged. It has been estimated that some secondary school teachers have lost as much as $6,000 even after strike pay has been taken into consideration;

e) it is not unusual for members of either negotiating team to receive threats to their safety and well-being.

f) the public image of the teaching profession may suffer as a result of sanctions. The public's reaction to the Metropolitan Toronto strike in 1975 is a classic example of how devastating this can become. In many ways, the community turned against the teachers;

g) a party should consider the possible long run implications of a decision to strike or lock-out. For instance, how will the strike or lockout affect future relationships? the administration of the agreement? the handling of future grievances? future bargaining? teacher morale?

h) if the government should decide to intervene in the dispute, the parties should consider the possibility that the terms of the government legislation may include final offer selection and a multi-year settlement. Both parties should give this possibility serious consideration.

vi) Making Informal Suggestions

Although alerting each side to the heavy costs of using the strike/lock-out weapon may avert unnecessary sanctions, it may not, in itself, lead to a settlement. In fact, it may prevent a timely settlement. As Clark Kerr has noted: "A particularly difficult controversy to mediate, strangely enough, is one in which the costs of aggressive conflict to each party are enormous. Then any one of many situations is

better than a strike and the process of narrowing these possible solutions to a single one is an arduous task."[18]

It is in situations like this that a mediator can, and perhaps should, offer informal suggestions for resolving the dispute. A mediator can assist the parties in getting their expectations to converge by giving "prominence" to a particular solution.

A solution's "prominence" may derive from its simplicity, its uniqueness or its precedent-setting nature, etc. Several years ago a particularly difficult strike was resolved when it was suggested to both parties that they send their dispute to a new process called "med-arb", a combination of mediation and arbitration. This suggestion was accepted. It was simple and straightforward. It was unique because no one had ever used the process before in Ontario. And it was attractive to the parties at that time because they were setting a precedent under the legislation. They were the first to "discover" and use the process in teacher-school board bargaining.*

Giving "prominence" to a particular solution can be one of the most important contributions a mediator can make to the negotiations. It is not a matter of the mediator imposing his will upon the parties, of forcing upon them his idea of what constitutes an equitable settlement. It is simply a matter of assisting the parties in co-ordinating their efforts, of helping the parties get a fix on what the settlement could be.

---

18 Clark Kerr, p.239.

* Recommendations of this nature should only be made after consultation with the Education Relations Commission.

vii) Making Recommendations in Joint Conference

Properly timed mediator recommendations can be extremely effective when made in joint conference. Some of the dynamics involved in such a strategy have been discussed by Peters.

"In general the conciliator plays his most active role in the separate sessions with the parties. It is here that he can express his opinions most freely and exert his persuasive powers to the utmost. Only under certain conditions is it wise or expedient for him to take positions across the open table. This involves the exercise of keen judgment in timing. Very often it occurs when the negotiators are stalemated and obviously want to compromise. Frequently a compromise proposal thrown across the open table by the conciliator will carry because the parties are face to face and exerting direct pressure on each other. The very same compromise might not carry if the conciliator tried to explore it in separate discussions. The parties would be tempted to bear down on the conciliator rather than on each other.

"At other times proposals by the conciliator across the open table are feasible when it becomes apparent that one party or the other is willing to concede a disputed point, but wants to be persuaded. Also, if a proposal under consideration by one of the parties is close to what is acceptable, it will not be resentful of persuasion by the conciliator in open session.

"Frequently the conciliator is given a wide latitude in making compromise proposals in open session to clear away minor issues, after the basic issue has been resolved, and the strike threat with its tensions has been removed. The conciliator often can also exert an aggressive leadership when one or the other party in negotiations does not want to take responsibility for the situation. This may occur when there is a factional split in the management of a large company and neither faction wants to take the responsibility for making concessions to the union which are warranted by the practical aspects of the situation. On the union side it may be the business agent who refuses to take responsibility for the situation by making positive recommendations to his committee or the membership. He may tag along behind his committee, covering his lagging footsteps by being an exponent of super-democracy."[19]

viii) Making Public Recommendations

Should mediators make public recommendations? This has been, and continues to be, a widely debated issue in industrial relations circles. As Walter A. Maggiolo, has pointed out:

---

19 Op.cit., pp.195-196.

"For a long time, it was a cardinal principle of good mediation that the only proper place for suggesting an alternative or compromise solution to an issue or issues in dispute was in a separate meeting. It was only in rare cases where the mediator departed from this rule.

"Such suggestions or compromises were informal and made orally. No thought was ever given to formalizing such suggestions in writing. The publicizing of such suggestions was never even considered.

"Many mediators felt that if a suggestion was formalized and publicized, it was stating in effect that in the mediator's opinion the suggestion represented his judgment as to what would be a fair and equitable solution to the dispute. If the suggestion was rejected by one or both parties, he would have lost his effectiveness thereafter. Further, if rejected it ill behooved him a few days later to formalize another and different suggestion as to what would be a fair and equitable solution of the dispute."[20]

There has been some softening of these views, though, over the last decade. It has become increasingly clear that there are situations which dictate the need for more active intervention by the mediator. William Simkin, the former Director of the Federal Mediation and Conciliation Service, has identified four situations which may call for a mediator to make formal recommendations:

"(1) **Face saving.** Neither party is prepared to make a final proposal, but both will accept the proposal if made by the mediator. Both know the content of the recommendations in advance and both have privately committed themselves to acceptance. However, some combination of pride, facesaving, politics, and awkwardness of retreating from a far-out position make it impossible for one or the other or both sides to retreat gracefully.

"(2) **Division in the ranks.** As in the first situation, the parties know the content of the mediator's recommendation in advance, but one or both sides are divided as to its acceptability. If there is a good chance that the mediator's views will help secure strong majority acceptance and if the alternative is a certain and immediate strike or continuance of a prolonged strike, he probably should make the recommendation.

"(3) **Mediator's hunch.** In some situations there is no certainty that the mediator's recommendation will be accepted by anyone, but the mediator has a strong hunch that acceptance will be obtained.

---

20 Ibid., p.57.

"(4) **Narrow the issues.** In some cases the mediator is reasonably certain that his recommended package will not be accepted. However, he is similarly certain that a process of recommendation and partial rejection will substantially narrow the issues in dispute. To make recommendations in such a situation could severely limit a mediator's continuing usefulness in the particular case, but if he can leave the case in better shape for eventual settlement, it might be a good move."[21]

Experience with formal recommendations have proved successful. The FMCS in Washington has found that in 95% of the cases where a mediator has made recommendations they have been accepted by the parties. Even in the remaining situations, where the recommendations were rejected by one or both of the parties, a followup comparison of the recommendations with the final terms of settlement showed few, if any, variations.[22]

According to Walter Maggiolo, formal recommendations must be properly timed to be effective. There are five general criteria that should be met:

"1. A threatened strike or the prolongation of an existing strike is having a major impact on the community involved.

2. The parties are deadlocked and no negotiated solution appears possible in the immediate future.

3. The parties have rejected alternative methods of solving the issues.

4. The mediator has a thorough knowledge of the issues in dispute.

5. The mediator has, by judicious explorations in joint or separate conferences, obtained a feeling for the issues and believes a middle ground exists."[23]

The context surrounding the presentation of a mediator's recommendations is also important. According to Maggiolo:

"Before such presentation the mediator should advise the parties that unless they are able to find a solution themselves by a fixed time he will have to give serious consideration to the making of recommendations.

---

21 Peach and Kuechle, pp.175-176.

22 Maggiolo, p.58

23 Ibid.

In some cases, the very existence of a threat of possible recommendations has been sufficient to inspire agreement.

In a number of these cases, these recommendations or suggestions have been reduced to writing and handed to the parties in each other's presence.

Generally mediators preface the written recommendation by:

> (a) Recitation of the importance and impact of the dispute.
>
> (b) Recitation of the number of meetings held by the mediator in an attempt to help the parties resolve the dispute.
>
> (c) The futility of such meetings.
>
> (d) A statement that as long as the parties adhere to their present positions, no agreement appears possible in the immediate foreseeable future.
>
> (e) That in light of these factors, he is proposing 'at this time' the following solutions."[24]

After the parties have received the copies of the document, the mediator should not permit any discussion as to the merits of the recommendations at that time and merely entertain questions relating solely to clarification.

If no such questions are asked, he should request the parties to study the recommendations in separate caucuses and advise him in a prescribed time of their acceptance or rejection.

If the recommendations are rejected, the question then arises as to whether he should make the recommendations public knowledge. According to Maggiolo, public recommendations can exert pressures on the parties to settle:

"Each party to a labour contract negotiation is keenly conscious of its public relations position. Each is seeking to elicit public support for the alleged fairness and reasonableness of its offer or demand. At the minimum, each seeks sympathetic neutrality; at the maximum, each seeks the exertion of public pressure which will impel the other party to either accept the offer or demand or to modify its position.

---

24 Ibid., p.59

"Normally, neither party desires to have a public exposure by a neutral of the true differences between them. Nor generally speaking, do they desire to have the public know that the neutral suggested a solution and they have rejected it.

"Recognizing these facts, when mediators do make recommendations, in most cases, they will reserve the right to make such recommendations public.

"Experience indicates that the mere threat to do so at a later day compels each party seriously to consider the recommendations and, if unacceptable in whole or in part, to reevaluate their position and find a new approach to the solution of the unresolved issues.

"An examination of the disputes in which mediators have made recommendations shows that it has seldom been necessary to make the recommendation public. Apparently, they stimulated further thinking which led to a breaking of the log jam in the negotiations.

"If the parties do accept the mediator's recommendations, the preferable practice is to announce publicly that recommendations have been made but not to disclose the specific terms pending the ratification meeting."[25]

ix) Miscellaneous Pressure Tactics

The pressure tactics discussed above are some of the most commonly used mediator strategems. There are, of course, many other tactics the limit of which depends on the situation and one's imagination. Here are a few additional types of pressure levers:

- The "threatened withdrawal" technique. A mediator threatens to adjourn the mediation process and advises the parties that he probably won't return until they have had their strike and are willing to "talk sense". This can be effective if the parties really do not want to go on strike and are afraid they will not be able to settle without the mediator's help. It is effective because it places the mediator in a position to demand certain concessions from the party before he will commit himself to staying with them.

- The technique of "bringing in new faces". Here a mediator threatens to withdraw himself voluntarily from the dispute and request the services of a new mediator (perhaps offering the name of someone who would be most unacceptable to one or both of the parties). The

25 Ibid.

"costs" or uncertainty of changing mediators in midstream may be enough to elicit further concessions from the parties. This can be an effective threat if the mediator stipulated at the outset that unsuccessful mediation would result in the parties' positions reverting to those which they held at the beginning of the process. If the parties have made some concessions during the mediation, and have built up some investment in the process, they will not be likely to agree to having all their efforts go up in smoke.

- Lastly, there are times when a mediator may have to "go over the negotiator's head". In the words of Peach and Keuchle:

"Occasionally, but not often, a mediator resorts to persons away from the bargaining table in order to apply pressure. Most frequently these are higher authorities in the company or the union and occasionally the media. In cases where the chief bargainer on one side or the other is recalcitrant and resists the crunch, displaying unwillingness to take responsibility for a decision, the mediator may seek out the negotiator's superior in order to explain the consequences of his man's stance. Most often he does this after having consulted with his own superior - the Director of the Mediation Service or the Labour Minister - and securing permission to arrange a top-level meeting out of the hands of the designated bargainers.

"Such a tactic is used rarely, and it is demeaning to the negotiators. It is almost never done without knowledge of the negotiators. However, if a negotiator is aware that it might happen, the mediator can often get him off center by dropping a subtle hint regarding the consequences of his recalcitrance."[26]

---

26 Peach and Kuechle, p.174.

CONCLUSION

Collective bargaining and mediation are highly complex and dynamic processes. We had to brake each of them down analytically in order to isolate and discuss their various stages, subprocesses, strategies and tactics. In "real" life, of course, all these elements are more or less fused into a unified experience, often accompanied by a super-charged emotional atmosphere, and a portion of irrationality thrown in for good measure. To further help you to "get into" the mediation experience - at least vicariously - and to give you an opportunity to practice some of the things you have read, we have put together ten role play episodes, taken from real life situations, that will help you to integrate and test your skills. These episodes are contained in Appendix A.

ANALYTICAL TABLE OF CONTENTS

APPENDIX A: ROLE PLAY EXERCISES

As a mediator, what sorts of strategies and tactics would you use to deal effectively with the following real-life episodes?

You might find it helpful to think in terms of multiple strategies, of using several strategies either serially or in combination to achieve maximum effect. In addition, how could you structure the situation to increase the probability of success? What kinds of responses would you predict from the parties? How would you deal with those responses?

- Negotiating a meeting

  - Early in negotiations
  - High level of mistrust
  - No brief presented by either side.

- It's their turn to move

  - Late in negotiations
  - Second meeting with mediator who helped parties make substantial progress in first meeting
  - Fairly good relationships, but....
  - Three items remain - grid, PTR and QECO III.

- Attacks on mediator

  - Early in negotiations
  - Mediator's first meeting
  - Poor climate
  - Many items outstanding.

- "The Board's PTR figure is wrong"

  - Late in negotiations
  - Issues - PTR, Grid, COLA
  - Poor relationships
  - Fourth meeting with mediator

- Board's professional negotiator is "in the way", teachers claim they can't get to the people who make the decisions.

  - Mid-point in negotiations
  - First meeting with mediator
  - Main issues are PTR and Grid
  - Strained climate.

- The teacher negotiator refuses to give you access to the teacher caucus

  - Six months of negotiations
  - Fairly good climate
  - Main issues: grid, allowances, retirement gratuity, class size
  - First meeting with mediator.

- The Board insists they get their current offer to ALL teacher, because they are convinced the teachers would accept.

  - Late in negotiations
  - Last offer vote 84%
  - Talk of take-over team
  - Issues: grid, allowances, leaves
  - Climate is strained
  - Fifth meeting with mediator.

- Early in mediation. There are 14 outstanding issues and the teachers insist that all issues are of equal importance.

  - Climate is uncertain
  - Both parties fragmented
  - 14 issues
  - First meeting with mediator.

- Promised an offer in 3 hours. Negotiator demures.

  - Late in negotiations
  - Relationship bad
  - Five issues: grid - (parity with public), class size, just cause, seniority list, QECO III
  - Third meeting with mediator.

- You have imposed a news blackout. Both sides have agreed. When the evening edition appears, you find the teacher negotiator has given a press interview that morning.

  - Climate is frustrated by principal figures in both parties
  - Second meeting with mediator
  - Four issues remain: grid, allowances, retirement gratuity, leaves
  - Board is furious.